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SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

October Term, 1969

No. 177

Office-Supreme Court, U.S.
FILED
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JOHN F. DAVIS, CLERK

OLIVER ROSENBERG; STEPHEN H. TYNG, SR. and STEPHEN H. TYNG, JR.,
Petitioners

v.

MARIE MINICHIELLO, as Executrix of the Estate of THOMAS MINICHIELLO, and MARIE MINICHIELLO; and ELWIN W. STEVENS, on behalf of his son, DENNIS J. STEVENS, an infant over fourteen years of age; and ELWIN W. STEVENS, individually,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

October Term, 1968

No. 1461

OLIVER ROSENBERG; STEPHEN H. TYNG, SR. and STEPHEN H. TYNG, JR.,

Petitioners

vs.

MARIE MINICHIELLO, as Executrix of the Estate of THOMAS MINICHIELLO, and MARIE MINICHIELLO; and ELWIN W. STEVENS, on behalf of his son, DENNIS J. STEVENS, an infant over fourteen years of age; and ELWIN W. STEVENS, individually,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioners, Oliver Rosenberg; Stephen H. Tyng, Sr., and Stephen H. Tyng, Jr., respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceedings on April 2, 1969.

OPINIONS BELOW

The opinion of the majority of the hearing panel is not yet reported but appears at page 1a of the Appendix to this petition; the dissenting opinion of Judge Anderson appears at page 13a of the Appendix.

The majority opinion handed down after reconsideration of the case by the court en banc is not yet reported, but appears at page 41a of the Appendix hereto; the dissenting opinion filed at the same time appears at page 48a of the Appendix hereto.

JURISDICTION

The original opinion and judgment of the Court of Appeals for the Second Circuit, and a dissenting opinion, were handed down on December 12, 1968. Timely petitions for rehearing were filed, and the Court of Appeals entered an Order granting reconsideration by the court en banc on the original briefs and supplemental briefs, but without reargument (App. 40a). The opinion and decision of the court en banc, and a dissenting opinion, were filed on April 2, 1969; and this petition for certiorari was filed within 90 days of that date.

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether, consistent with the due process clause of the Fourteenth Amendment, an individual not residing in New York, having no personal contacts with that State, and who purchases and receives an automobile liability insurance policy outside New York, can be subjected to a suit in New York based on an accident that happened outside New York, solely because the nonresident's insurer has an office in New York and the plaintiff is a resident of New York?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part as follows:

> "SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law;* nor deny to any person within its jurisdiction the equal protection of the laws." (Emphasis added)

Sections 5201 (a) and 6202 of the New York Civil Practice Laws and Rules provide as follows:

> "(a) Debt against which a money judgment may be enforced. A money judgment may be enforced against any debt, which is past due or which is yet to become due, certainly or upon demand of the judgment debtor, whether it was incurred within or without the state, to or from a resident or non-resident, unless it is exempt from application to the satisfaction of the judgment. A debt may consist of a cause of action which could be assigned or transferred accruing within or without the state." (5201, subd. [a])
>
> * * * * *
>
> "Debt or property subject to attachment; proper garnishee. Any debt or property against which a money judgment may be enforced as provided in section 5201 is subject to attachment. The proper garnishee of any such property or debt is the person designated in section 5201; for the purpose of applying

the provisions to attachment, references to a 'judgment debtor' in section 5201 and in subdivision (h) of section 105 shall be construed to mean 'defendant.' (6202)."

Section 320 of the New York Civil Procedure Laws and Rules provides in pertinent part as follows:

> "(c) *When appearance confers personal jurisdiction, in certain actions.*
>
> "In a case where the court's jurisdiction is not based upon personal service on the defendant, an appearance is not the equivalent to personal service of the summons upon the defendant if an objection to jurisdiction under paragraphs eight or nine of subdivision (a) of rule 3211, or both, is asserted at the time of appearance by motion or in the answer, *unless the defendant proceeds with the defense after asserting the objection to jurisdiction and the objection is not ultimately sustained.*" (Emphasis added.)

STATEMENT OF THE CASE

Petitioners were the defendants below, and for the sake of clarity will be so designated in this petition; the respondents will be referred to as plaintiffs.

The constitutional issue presented by this case arose in New York state court actions each of which was, on motion of the defendants, removed to the appropriate federal district court pursuant to the diversity statute, 28 U.S.C. §1332 and the removal statute, 28 U.S.C. §1441.

The respective defendants then moved to dismiss for lack of jurisdiction under the due process clause of the Fourteenth Amendment and, in each case, that motion was denied.

Acting pursuant to 28 U.S.C. §1292 (b), each district court thereafter certified that its decision involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal might materially advance the ultimate termination of the litigation. The Court of Appeals for the Second Circuit granted each defendant's motion for leave to appeal.

The case of *Rosenberg v. Minichiello* was argued to the Court of Appeals on October 9, 1968. Thereafter, at the direction of the Court of Appeals, the case of *Stevens v. Tyng* was submitted to that court on briefs.

The original decision of the Court of Appeals dated December 12, 1968 affirmed the decisions of the district court in each case. The majority opinion of Judge Friendly was joined by Judge Feinberg; Judge Anderson filed a dissenting opinion.

Timely petitions for rehearing before the Court *en banc* were filed by defendants and granted by the Court of Appeals. The Court then reconsidered the cases on the basis of both prior and supplemental briefs, but without additional oral argument.

The final decision of the Court of Appeals dated April 2, 1969 again affirmed the district court's decision in each

case. The majority opinion of Judge Friendly was joined by Judges Waterman, Smith, Kaufman, Hays and Feinberg (App. 41a). The dissenting opinion of Judge Anderson was joined by Chief Judge Lumbard and Judge Moore (App. 48a).

The question which so divided the Court of Appeals involves basic considerations of due process of law under our Federal system. From the very beginning the petitioners here, as defendants below, grounded their challenge to jurisdiction on the due process clause of the Fourteenth Amendment and asserted that a contrary decision would fly in the face of decisions of this Court interpreting and applying that Amendment. The basis for defendants' challenge to the jurisdiction becomes apparent upon a mere recitation of the basic facts in each case:

(1) Defendant Rosenberg, a resident of Pennsylvania, had bought and received in that State an automobile liability insurance policy. On January 9, 1965, driving on a highway near Harrisburg, Pennsylvania, plaintiff Minichiello, a resident of New York, collided with Rosenberg. In January of 1968, Minichiello's executrix sued Rosenberg in the New York state courts and had a writ of attachment served on an office maintained in New York by Rosenberg's insurer. Rosenberg was not served. Solely on the basis of the purported attachment of the insurer's obligation to defend and to indemnify Rosenberg, and plaintiff's residence in New York, the district court and the Court of Appeals have now upheld New York's jurisdiction over defendant Rosenberg, although the accident happened in Pennsylvania, the policy was issued in Pennsylvania, and Rosenberg admittedly has had no personal contacts of any kind with New York.

(2) Similarly, defendants Tyng were held subject to suit in New York although both father and son are residents of Massachusetts, the insurance policy was purchased and delivered in Massachussetts, and the accident with

plaintiff Stevens happened in Massachusetts. Neither of the Tyngs had any personal contacts with New York and neither was served. Nevertheless, the Court of Appeals held that service of a writ of attachment on an office of the Tyngs' insurer in New York was sufficient to subject them to suit in that State by a resident of that State.

In the Court of Appeals, the defendants emphasized the following reasons why they could not constitutionally be subjected to suit in New York on these causes of action:

(1) The fact that the non-resident defendants' respective liability insurers had offices in New York did not give that state jurisdiction over any "property" in the state to support even a quasi-in-rem jurisdiction over the defendants.[1] The insured's right to require and the insurer's duty

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[1] This type of proceedings has been labelled a "Seider attachment" because it was first upheld by the New York Court of Appeals in *Seider v. Roth*, 17 N.Y. 2d 111. In that case, Judge Burke, speaking in dissent for himself and two other judges, cogently described the "debt" as follows (17 N.Y. 2d 115):

> The so-called "debt" which is supposed to be subject to attachment is a mere promise made to the nonresident insured by the foreign insurance carrier to *defend and indemnify* the Canadian resident *if a suit is commenced* and *if damages are awarded* against the insured. Such a promise is contingent in nature. It is exactly this type of contingent undertaking which does not fall within the definition of attachable debt contained in CPLR 5201 (subd.[a]), i.e., one which "is past due or which is yet to become due, certainly or upon demand of the judgment debtor". The bare undertaking to defend and indemnify is not an obligation "past due" and it is not certain to become due until jurisdiction over the insured is *properly* obtained. In New York "It is well settled that an indebtedness is not attachable unless it is absolutely payable at present or in the future, and not dependable upon *any* contingency." (Herrmann & Grace v. City of New York, 130 App. Div. 531, 535, affd. on opn. of Appellate Division 199 N. Y. 600; italics supplied.)
>
> Faced with this long-established rule the plaintiffs indulge in circular ratiocination. The jurisdiction, they assert, is based upon a promise which evidently does not mature until there is jurisdiction. The existence of the policy is used as a sufficient

basis for jurisdiction to start the very action necessary to activate the insurer's obligation under the policy. In other words, the promise to defend the insured is assumed to furnish the jurisdiction for a civil suit which must be validly commenced before the obligation to defend can possibly accrue. "This is a bootstrap situation." (Professor D. D. Siegel, Supplementary Commentary to CPLR 5201, McKinney's Cons. Laws of N. Y., Book 7B, 1965 Pamphlet, pp. 10-13.)

* * * * *

Not only does the text of CPLR and the contingent nature of an automobile liability policy dictate a vacatur of the warrant of attachment but, where the grounds to obtain jurisdiction are tenuous, public policy should restrain us from approving, under the guise of "in rem" jurisdiction over a nonresident motorist, "a direct action" against a foreign insurer licensed to do business in this State on a policy issued in Montreal to a resident of Quebec, Canada, for damages resulting from a Vermont accident. (17 N.Y. 2d 117).

In *Simpson v. Loehman*, 21 N.Y. 2d 305, the New York Court of Appeals also upheld the Seider attachment over federal constitutional objections. Speaking for himself and Judge Scileppi in dissent on that occasion, Judge Burke said:

Seider may be upheld only if we may constitutionally provide for our residents (and for all who would later come into our courts, Seider would seem to allow) an umbrella of protection, including venue at the plaintiff's convenience and without any regard for the convenience of defendants or the availability of witnesses, unlimited in its extent,[4] only if we may say to such persons that no matter which State or nation they travel to they carry with them the right to bring back to the New York courts for adjudication controversies otherwise completely local in character. I do not read Watson as allowing this and, in fact, Home Ins. Co. v. Dick (281 U. S. 397) may be read as barring such an extension of the regulatory power of this State beyond its territorial limits. In Dick, the Supreme Court, in language particularly apt for the Seider situation, pointed out that residence was not enough to create such jurisdiction. It there remarked: "The fact that Dick's permanent residence was in Texas is without significance. At all times here material, he was physically present and acting in Mexico" (supra, p. 408;

4. For example, in Victor v. Lyon Assoc. (21 N. Y. 2d 695) plaintiff was injured in Danang, South Vietnam. Defendant is a Maryland corporation doing business in the Far East and the policy was issued in Okinawa. Coverage was limited to certain areas in the Far East.

mphasis added; cf. Clay v. Sun Ins. Office, Ltd., 377 U. S. 179, 182). Likewise, at all times that I would consider material, to wit, when the accidents occurred, Seider and the plaintiffs in the cases now before this court, Simpson and Victor, were "physically present and acting" outside this State. (21 N.Y. 2d 319-320.)

Watson is in many ways analogous to developments that have taken place in the extension of State court jurisdiction under the various State "long-arm" statutes. In fact, many would urge that on the facts of that case Louisiana might have constitutionally exercised in personam jurisdiction over the out-of-State manufacturer (compare Gray v. American Radiator & Std. Sanitary Corp., 22 Ill. 2d 432; compare, also, Feathers v. McLucas, 15 N. Y. 2d 443, 458-464, with the subsequent amendment to CPLR 302 added by L. 1966, ch. 590). Under the facts of Seider and the cases now before us I know of no authority that would support in personam jurisdiction in the courts of this State over the out-of-State defendant-insured.

The very same considerations lead me to doubt that jurisdiction in rem based upon the obligations of an insurer under a contract of insurance can constitutionally be exercised by this State in the Seider situation. Assuming even the continued utility and constitutional viability of the rule of Harris v. Balk (198 U. S. 215) that a debt has its situs and may be attached in any State in which the debtor is subject to in personam jurisdiction, it is clear that the obligations of an insurer under a liability policy to defend and indemnify the insured are not "ordinary debts," such as the Supreme Court was considering in Harris v. Balk (see 198 U. S., p. 223). They are contingent contractual obligations, requiring the commencement of suit against the insured (and the obtaining of a judgment with respect to the obligation to indemnify) before the insured has any claim against the ostensible "debtor" insurer. The defendant-insured has no property within the State, which is the necessary predicate for an exercise of in rem jurisdiction (Hanson v. Denckla, 357 U. S. 235, 246), unless New York may properly (i.e., constitutionally) transform these contingent obligations into matured debts owing to the insured. This it cannot do absent a sufficient State interest in the insurance relationship or the accident. In my dissent in Seider I referred to the result obtained there as jurisdiction acquired through a "bootstrap operation" (17 N. Y. 2d 111, 115, quoting Professor Siegel). This sort of bootstrap operation, I respectfully submit, is constitutionally impermissible under the circumstances pre-

sented in Seider and the cases now before this court (21 N.Y. 2d 318-320).

In the same case, Judge Breitel concurred "only on constraint of *Seider v. Roth*" and said, for himself and Judge Bergan:

> It is the most tenuous of nominalist thinking that accords the status of an asset, leviable and attachable, to a contingent liability to defend and indemnify under a public liability insurance policy.
>
> The applicable statutes are CPLR 5201 (subd. [a]) and 6202. They read as follows:
>
> "'(a) Debt against which a money judgment may be enforced. A money judgment may be enforced against any debt, which is past due or which is yet to become due, certainly or upon demand of the judgment debtor, whether it was incurred within or without the state, to or from a resident or non-resident, unless it is exempt from application to the satisfaction of the judgment. A debt may consist of a cause of action which could be assigned or transferred accruing within or without the state." (5201, subd. [a])
>
> and
>
> "Debt or property subject to attachment; proper garnishee. Any debt or property against which a money judgment may be enforced as provided in section 5201 is subject to attachment. The proper garnishee of any such property or debt is the person designated in section 5201; for the purpose of applying the provisions to attachment, references to a 'judgment debtor' in section 5201 and in subdivision (h) of section 105 shall be construed to mean 'defendant'" (6202).
>
> True, these contemporary statutes are designed to reach every kind of marketable and assignable property, and every kind of right that is reducible to marketable or assignable economic value. They refer to debts and property, and in the case of causes of action they must be assignable. But they are not intended or designed to reach every obligation created by contract, however inchoate, conditional, contingent, or personal. The obligation to defend and, even more, the obligation to indemnify are just such inchoate, conditional, contingent, and personal obligations. Before they come into play, there must be an external event (usually an accident) within the coverage of the policy, performance of conditions precedent by the insured, and co-operation by the insured. Even then, if the insurer's obligation to defend is fully performed, there is noth-

to furnish a defense and indemnification, is not a right or "debt" that can be assigned, sold, pledged, devised, or otherwise disposed of by the inursed. It does not entitle the insured to any money, security or property of any kind. Nor can such rights or "debts" be seized, appraised and sold by any sheriff or marshal. And, under the policy, neither obligation arises until *in personam* jurisdiction over the insured has been made effective. Since *in personam* jurisdiction admittedly was not obtained over these non-residents in New York and since no attachable property of either was reached by the "attachment" served on their insurers, there

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ing of economic value to which the insured may make claim, receive, or assign. As to the obligation to indemnify, that does not ripen until accident, defense, and defeat resulting in judgment against the insured.

The statutes, in making intangible assets leviable and attachable, are not intended to reach the intangible right as such but instead to reach the tangibles that eventually must result from the intangible right. Thus, at the very least, before any intangible right has practical significance as an asset to be levied upon or attached, it must give promise of being translatable into an economically valuable tangible, usually cash. The instances are easiest for application of the statutes when, unlike here, the intangible right is marketable or assignable. Hence, the inappropriateness of precedents based upon life insurance policies (matured or unmatured), upon property or fidelity loss policies after loss, and the like. In each of such instances the insured's right to tangible funds has attained a cognizable probability of being translated into funds.

So much for the analysis of the rights involved, no merely theoretical matter, but one which goes to the usefulness of the legal concepts employed, which must have some root in reality. As for the effect of the rule, the practical consequences are highly undesirable. This State, and particularly its chief city, is the mecca for those seeking high verdicts in personal injury cases (see, e.g., Gilchrist v. Trans-Canada Air Lines, 27 A D 2d 524). On the basis of the rule in the Seider case, it will be the rare plaintiff who cannot invoke the jurisdiction of New York courts, even though only quasi in rem, since it will be a very small insurance company that does not have a palpable contact with this State. (21 N. Y. 2d 314-316).

is no basis on which jurisdiction could attach under the standards established by decisions of this Court such as *Cooper v. Reynolds Lessee*, 77 U. S. (10 Wall.) 308; *Black v. Zacharie & Co.*, 44 U. S. (3 How.) 483; *Pennoyer v. Neff*, 95 U. S. 714; *McDonald v. MaBee*, 243 U. S. 90; *Hanson v. Denckla*, 357 U. S. 235.

(2) The facts that the plaintiffs are residents of the forum state, and defendants' insurers have offices there, do not support jurisdiction over these causes of action which arose outside New York and involve defendants admittedly having no personal contacts with New York. Any such assertion of jurisdiction is forbidden by decisions of this Court such as those cited in the immediately preceding subparagraph, as well as *Home Ins. Co. v. Dick*, 281 U.S. 397; *Hartford Accident & Indemnity Co. v. Delta & Pine Land Co.*, 292 U. S. 143; *International Shoe Co. v. Washington*, 326 U. S. 310; *Texas v. New Jersey*, 379 U. S. 674.

(3) A decision upholding New York's jurisdiction would force defendants to choose between (a) their constitutional right to a hearing before a court having jurisdiction and (b) their insurance coverage, since the New York Court of Appeals had already held in *Simpson v. Loehmann*, 21 N. Y. 2d 305, that the insurer could disclaim if the insured defendant did not appear for trial in New York. Such a choice, chilling the assertion of the right to due process of law, cannot constitutionally be imposed upon anyone: *U. S. v. Jackson*, 390 U. S. 570; *U. S. v. Robel*, 389 U. S. 508. Moreover, despite the New York Court of Appeals' legislative holding[2] that there could be no *recovery* in

[2] The legislature of New York never amended CPCR §320 to permit a genuine limited appearance in these *Seider* cases. See Stein, Jurisdiction by Attachment of Liability Insurance, 43 *N.Y.U. L. Rev.* 1075, notes 58-62, and 198-199. The New York Court of Appeals, in *Simpson v. Loehmann*, 21 N.Y. 2d 990, purported to create such a provision in an attempt to save the *Seider* attachment procedure from federal constitutional objections. Ibid. The Court of Appeals for the Second Circuit did not of course question the validity of this judicial "miracle" (App. 8a, 9a).

New York in excess of the face of the policy even if the nonresident insured defendant did appear and defend in New York, the defendant could be subjected to suit in other states for the excess of that judgment over the face of the policy, all of which would have been appropriated to satisfy the improper New York judgment.[3]

4. Even if the Court of Appeals considered its only duty to be application of traditional standards of "fair play" or an appropriate "balancing of interests", the attempt to force defendants to come to New York to litigate must be rejected. Otherwise, any resident of that state can go to any other state in the United States, use its highways, cause an accident, and then haul the other parties all the way to New York for trial—all because of the fortuitous

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[3] The majority of the hearing panel below seemingly took the position that all due process objections to the *Seider* attachment were dissipated because (a) the New York Court of Appeals stated that there could not be any *recovery* in New York beyond the face amount of the insured's liability policy (App. 8a), and because (b), despite authority to the contrary, the court below thought it "clear that neither New York nor any other state could constitutionally give collateral estoppel effect to a *Seider* judgment when the whole theory behind this procedure is that it is in effect a direct action against the insurer and that the latter rather than the insured will conduct the defense" (App. 8a, 9a, 12a).

But the court below then stated the obvious answer to the last part of this rather curious contention when it added (App. 10a):

> "To be sure it may be cold comfort to a nonresident defendant to have our assurance that if some state should be so misguided as to consider a New York *Seider* judgment as concluding him, he will be able to have this ruling overturned by the Supreme Court of the United States. But we cannot fairly hold that New York has denied due process merely because of the possibility that some other state may do so."

There would be no comfort at all in the insured's loss of his entire insurance coverage in one New York suit, either by default or the unavailability of out-of-state witnesses. Loss of "only" the face of the policy is loss of everything he has to protect himself in such situations.

fact that the other party's insurer has an office in New York. The non-resident defendant can be forced to trial away from the scene of the accident, without benefit of any fact or medical witnesses who choose not to attend, in a state with which he has at no time had any contact, and which cannot serve him with process. Such a shocking result does not meet even the most basic requirements of fair play and substantial justice.

A majority (Judges Friendly and Feinberg) of the Hearing Panel of the Court of Appeals affirmed the district court, giving the following reasons (App. 1a):

1. This Court's decision in *Watson v. Employers Liability Assurance Corp.*, 348 U. S. 66, indicates that this Court would approve a "direct-action" statute against an insurer doing business in the plaintiff's state, even though the accident happened in another state, the policy was issued in another state, and the defendant was not in the forum state at any relevant time. Thus, considering that this "attachment" procedure is in effect a judicially created direct-action statute (the New York legislature never having enacted one); considering the *insurer* as the real party in interest; and considering the non-resident insured simply as a conduit who has to be named as a defendant so that the plaintiff can get at the insurer, the Court of Appeals upheld the procedure.

2. Noting that the New York courts had held that there be no recovery in New York against the non-resident defendant in excess of the policy limits, the majority of the Court of Appeals held that neither the New York courts nor the courts of another state could give collateral estoppel effect to a *Seider* judgment in excess of those limits. The majority noted that it would be "cold comfort" to such a non-resident defendant to know that if another state undertook to hold him bound by such a judgment "he will be able to have this ruling overturned by the Supreme Court of the United States" (App. 8a).

3. Noting that constitutional problems might also arise concerning counterclaims, the majority held that, since the insured could not assert a counterclaim in a "direct-action" suit, it would not be a denial of due process for New York to allow him to assert one in a *Seider* action only at the risk of personal liability.

4. Since the recovery in New York was to be limited to the policy limits, the majority rejected the insured's position that he has been put to an unconstitutional choice of either due process or loss of his insurance through disclaimer as allowed by the Court of Appeals of New York.

Judge Anderson, in a dissenting opinion (App. 13a) pointed out that, since this Court's *Watson* decision was based principally on the fact that the accident happened in the forum state, that case did not support the majority's decision in this case. He also said that, tested by traditional standards of fair play and substantial justice, permitting this litigation in New York is improper, adding that such a rule would permit a resident of Alaska, injured in Alaska by a New York driver, to be forced to come to New York to defend a suit by the latter. Judge Anderson also noted that due process requires a balancing of interests, not just consideration of the residence and desires of the plaintiff.

Defendants filed Petitions For Rehearing Before The Court En Banc (App. 21a and 33a). In those Petitions, defendants included the following arguments:

(1) The *Watson* case does not validate a legislative much less a judicially created "direct-action" statute applicable to causes of action arising outside the forum against a non-resident defendant having no contacts with the forum state. Indeed, in *Watson*, this Court had indicated exactly the contrary. 348 U. S. 72-73. And no state has ever enacted such a statute.

(2) Even though New York has no direct-action statute, and the insurer was not a party to this litigation, the Court of Appeals decided the case as though the insurer

were the defendant in each case, and without regard to the actual individual defendants' contention that New York lacked personal jurisdiction over them and had no "res" within its borders justifying the so-called quasi-in-rem jurisdiction.

(3) The shocking result outlined in Judge Anderson's dissent should not become the law of the Second Circuit without examination by the entire court.

The Court of Appeals thereupon agreed to reconsider the case on the briefs already filed and supplemental briefs, but without oral argument (App. 40a).

The Court of Appeals *en banc* was also divided. Judge Friendly in an opinion joined by Judges Waterman, Smith, Kaufman, Hays and Fineberg, upheld the prior decision (App. 41a). Judge Anderson again dissented, and was joined by Chief Judge Lumbard and Judge Moore (App. 48a).

The majority this time took note that "defendants complain we did not adequately focus on the burden to a non-resident of having to defend a personal-injury action in another state, conceivably far from his domicile and the place of the accident, simply because his liability insurer has chosen to do business there." The majority's answer was that "We find this argument unpersuasive so long as *Harris v. Balk*, 198 U. S. 215, stands."

Analyzing and comparing *Balk* with the instant case, the majority concluded that the former governs the latter, despite the difference between Balk's admitted and certain $180 debt against Harris and these defendants' inchoate, contingent right to call on their insurers for a defense and possible indemnification. The majority again noted the undesirable consequences and possible constitutional infirmities of *Seider* type litigation, and expressed the hope that the legislature might re-examine the situation (App. 45a).[4]

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[4] Both the majority of the hearing panel below and the majority of the Court *en banc* were apparently torn by serious doubts at

almost every step along their way to affirming the validity of the *Seider* procedure. For example, the majority of the hearing panel said:

> (a) Even if New York could constitutionally provide for a direct action against an insurer doing business in New York, by a New York resident, with respect to an injury suffered elsewhere, *Seider* may still be vulnerable because it involves the nonresident insured as a party defendant (App. 5a).
>
> (b) There is doubt that this Court would sanction a direct action statute where the state was neither the place of injury nor the plaintiff's residence, and equal doubt whether *Seider* could validly be applied in such a case (App. 7a).
>
> Similarly, the majority of the panel felt the need to deny that certain decisions of this Court would prohibit New York from creating a remedy against nonresident defendants in out-of-state accidents solely for New York residents (App. 7a, note 6).
>
> (c) Not without reason, the New York Court of Appeals may have entertained qualms about the constitutionality of New York CPLR §320(c) (circumscribing limited appearances) both in Seider situations and other instances of *quasi in rem* jurisdiction (App. 9a, note 7).
>
> (d) There is authority that a *quasi in rem* judgment may, at least to some extent, work an estoppel on the fact issues which defendant has litigated or had an opportunity to litigate in that action (App. 10a).
>
> (e) There may be other problems of due process because of the possibility of a default judgment if the nonresident chooses not to appear, and the inability of the nonresident to assert a counterclaim without subjecting himself to personal jurisdiction (App. 10a-12a).

Similiarly, the majority of the Court *en banc* noted that in some, but not all cases, the "salutary provisions" of 28 U.S.C. §1404(a) will protect nonresident defendants from undue inconvenience (App. 44a). [The inadequacy of this supposed protection was exposed in Judge Anderson's dissent (App. 51a).]

The majority *en banc* also noted but declined to consider the problems which will arise where there are multiple claims exceeding the available coverage. Curiously enough, the panel's concern was for the *plaintiffs* where "the insured is without funds to pay the excess" (App. 45a); not one word about a resident of any state whose policy could be "attached" in two or more other states, and

In his dissent, Judge Anderson noted that the present validity of *Balk* has been severely challenged; that in any event it involved an "ordinary debt", as contrasted with the contingent, inchoate right to call for defense and indemnification involved here; emphasized that, while the debtor in *Balk* could be in only one jurisdiction at one time, defendants' insurers do business in many states, and could be pursued by different plaintiffs in different states on suits covered by but one policy; and predicted jurisdictional chaos if *Seider* survives. Judge Anderson also disagreed with the majority's view that both the doctrine of "forum non conveniens" and 28 U.S.C. §1404 (a) serve to alleviate *Seider's* constitutional weaknesses.

Since the Court of Appeals treated these two cases together, both originally and on rehearing, the defendants have filed this single petition for certiorari seeking reversal of the judgment below.

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consumed, without his ever having had a hearing before a court with jurisdiction over him or which could compel witnesses to appear.

Finally, the majority did add (App. 45a):

> "We would hope that realization of the complexities of such problems and the considerations urged in our brother Anderson's dissents might stimulate the reexamination of *Seider* intimated in *Simpson v. Loehmann, supra,* 21 N.Y. 2d at 312, 287 N.Y.S. 2d at 638 (opinion of Chief Judge Fuld), 21 N. Y. 2d at 814, 287 N.Y.S. 2d at 640 (concurring opinion of Judge Breitel), before the decision is taken up, perhaps only defensively, by other states."

REASONS FOR GRANTING THE WRIT

1. *The Decision Below Misinterprets and Misapplies Decisions of This Court Concerning an Individual's Right to Due Process of Law Under the Fourteenth Amendment.*

The net effect of the two majority opinions in the Court of Appeals is to reluctantly uphold the *Seider* attachment procedure, professedly in deference to two decisions of this Court. Petitioners submit that the Court of Appeals' majority interpretation and application of each of these decisions of this Court was erroneous and in conflict with the actual holding of this Court:

(a) The majority of the original hearing panel relied almost entirely on *Watson v. Employers Liability Assurance Corp.*, 348 U.S. 66. But that decision simply rejected an insurer's challenge to a legislatively-enacted direct-action statute to which it had consented, where the product was sold in the forum state, to a resident of that state, and the injury from it occurred in that state. Here there is no legislatively-enacted direct-action statute; the defendant is not a consenting insurer but a non-resident individual; this non-resident individual has had no contact whatever with the forum state; and the accident did not happen in the forum state. The two situations are totally different and the Court of Appeals converted *Watson* into something this Court never intended it to be.

Indeed, this Court in *Watson* indicated (348 U. S. 72-73) that, even in that case, with a legislatively-enacted direct-action statute on the books, a consenting insurer, and an injury in the forum state, to a resident of that state,

by a product shipped into the state by foreign corporations, the latter could not be subjected to the jurisdiction of the forum state:

> "In this case efforts to serve the Gillette Company were answered by a motion to dismiss on the ground that Gillette had no Louisiana agent on whom process could be served. If this motion is granted, Mrs. Watson, but for the direct action law, could not get her case tried without going to Massachusetts or Illinois although she lives in Louisiana and her claim is for injuries from a product bought and used there."

The Court of Appeals' interpretation and application of *Watson* in this case is directly contrary to this Court's actual holding and reasoning in *Watson* itself. Such a decision should be reviewed by this Court, especially since it involves generally applicable principles of federal constitutional law.

(b) On rehearing *en banc*, the majority of the Court of Appeals did not actually meet or answer the foregoing challenge to the hearing panel's reliance on *Watson*. Instead the majority said (App. 42a) that the individual nonresidents' arguments were "unpersuasive so long as *Harris v. Balk*, 198 U.S. 215 (1905), stands." The complete answer to that position is found in the dissenting opinion of Judge Anderson, joined by Chief Judge Lumbard and Judge Moore (App. 48a). That dissenting opinion points out that, even if *Balk* still has validity in today's drastically changed situation (which seems doubtful), it is not controlling in this case. The debt in *Balk* was an "ordinary debt" for $180, fixed, certain, and not subject to any contingencies; but the "debt" relied upon below is merely an intangible, inchoate right to call on an insurer for a defense and indemnification in a proper forum. Its

total lack of substance for jurisdictional purposes is devastatingly laid out in the dissenting and concurring opinions in the New York Court of Appeals, 17 N.Y. 2d 115, 117 and 21 N.Y. 2d 314-16, 318-320, quoted in footnote 1 to this petition.

Moreover, Judge Anderson pointed out, the fact that, under the ruling below, a nonresident defendant can be sued in any and every jurisdiction where the insurer has an office not only distinguishes *Balk*, (the debtor there could be in only one state at any given time) but provides further proof of constitutional invalidity.

The decision below, based, not on any act of the individual in or involving the forum state (there were none), but on the business practices of his multi-state insurer, is devoid of any rational basis for jurisdiction over the individual. "The unilateral activity of those who claim some relationship with a non-resident defendant cannot satisfy the requirement of contact with the forum state. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that *there be some act* by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U. S. 235, 253 (emphasis added).

This Court should review the lower court's reliance on *Harris v. Balk*, 198 U. S. 215, in the light of the significantly different situation prevailing in this case as well as intervening developments in the law which the majority below ignored.

2. *The Decision Below Represents a Drastic Departure from Both Traditional and Modern Concepts of Jurisdiction Over Individuals Which Has Never Been But Should be Passed Upon By This Court.*

The majority of the Court of Appeals' hearing panel, and the majority of that Court *en banc*, noted that this case

raised serious due process questions.[5] Yet each majority managed to decide the case without mentioning, much less discussing, even in a footnote, any of the landmark due process cases handed down by this Court over the years.[6]

---

[5] Those questions, involving the rights of an individual nonresident insured obviously were not actually before this Court in No. 50 October Term 1968. *Hanover Ins. Co. v. Victor*, appeal dismissed, 393 U.S. 7. An insurer doing business in New York would have no standing to invoke the jurisdiction of this Court to consider alleged violations of the constitutional rights of a different party—the nonresident insured. This Court has consistently refused to consider anything other than the rights of specific parties who are actually before the Court in a particular present controversy. See, for example, *Tyler v. Judges of the Court of Registration*, 179 U.S. 405, 406-407; *McCabe v. Atchison, T. & S. F. Ry. Co.*, 235 U.S. 151, 162; *Swift & Co. v. Hocking Valley Ry. Co.*, 243 U.S. 281, 289; *American Power & Light Co. v. Securities and Exchange Commission*, 329 U.S. 90, 107; *United States v. Raines*, 362 U.S. 17, 21; and see text and citations in Robertson & Kirkham (Wolfson and Kurkland Edition, 1951), *Jurisdiction of the Supreme Court of the United States*, §§297, 298.

[6] The legal commentators have been critical of *Seider* both in principle and in practice. As the majority of the hearing panel said (App. 3a):

> "Seider v. Roth received a poor press from the commentators. See, e.g., Reese, The Expanding Scope of Jurisdiction over Non-Residents—New York Goes Wild, 35 Ins. Counsel J. 118 (1968); Comment, Attachment of "Obligations"—A New Chapter in Long-Arm Jurisdiction, 16 Buffalo L. Rev. 769 (1967); Comment, Garnishment of Intangibles: Contingent Obligations and the Interstate Corporation, 67 Colum. L. Rev. 550 (1967); Note, Seider v. Roth: The Constitutional Phase, 43 St. John's L. Rev. 58 (1968); Comment, Quasi in Rem Jurisdiction Based on Insurer's Obligations, 19 Stan. L. Rev. 654 (1967); and a number of comments by Professor David Siegel of St. John's University School of Law, one antedating the Court of Appeals' decision, which have appeared in the annual supplements to CPLR §5201 in McKinney's Consolidated Laws of New York."

See Professor Siegel's seven later articles in the New York Law Journal, issues of March 6 through March 14, 1969.

And see Professor Stein's definitive article "Jurisdiction By Attachment of Liability Insurance," 43 *N.Y.U. L. Rev.* 1075 (1968), especially pages 1105-1108; 1111-1117.

Among the cases conspicuous by their absence are not only the following classics of other days:

Pennoyer v. Neff, 95 U. S. 714,
McDonald v. MaBee, 243 U. S. 90,
Hess v. Pawloski, 274 U. S. 352,
Home Ins. Co. v. Dick, 281 U. S. 397,

but also the more recent important decisions:

Milliken v. Meyer, 311 U. S. 457,
International Shoe Co. v. Washington, 326 U. S. 310,
Travelers Health Assn. v. Virginia, 339 U. S. 643,
McGee v. International Life Ins. Co., 355 U. S. 220,
Hanson v. Denckla, 357 U. S. 235,
Texas v. New Jersey, 379 U. S. 674.

Whether it be the result of, or the reason for, this unusual approach, the decision below is the first known to counsel in which a state has been permitted to assert jurisdiction over a non-resident who was not at any relevant time within that state's borders, and who performed no contract there, mailed no contract there, deposited no money there, did not drive there or fly there, received no money from residents there, bought no insurance there, and had no assets there.

None of the decisions of this Court listed above, nor indeed any other, would authorize such a result. It should not be permitted to become the law of this nation unless and until this Court has reviewed the matter in the light of its own prior decisions which have laid down the basic principles during various periods of our history. If the Fourteenth Amendment really permits every American involved in an accident in his home state with a resident of New York to be forced to go to trial in the courts of New York, a state to which he is a complete stranger, then the people and the other states should be told why, by this Court, so that they can attempt to protect themselves as suggested by Judge Anderson in the Court below (App. 20a).

Conclusion

The judgment of the Court of Appeals for the Second Circuit should be reversed and the complaint in each case dismissed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1969

No. 177

OLIVER ROSENBERG; ELWIN W. STEVENS, on behalf of his son, DENNIS J. STEVENS, an infant over fourteen years of age; and ELWIN W. STEVENS, individually,

Petitioners

vs.

MARIE MINICHIELLO, as Executrix of the Estate of THOMAS MINICHIELLO, and MARIE MINICHIELLO; and STEPHEN H. TYNG, SR. and STEPHEN H. TYNG, JR.

Respondents

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Opinion and Dissenting Opinion of the United States Court of Appeals for the Second Circuit

OPINION OF THE COURT

FRIENDLY, *Circuit Judge:*

These two appeals are from orders denying motions to dismiss complaints of New York residents in automobile accident actions against nonresident defendants wherein jurisdiction was predicated on attachment of the defendants' interests in liability insurance policies issued by companies doing business in New York, CPLR §§5201, 6202. They require us to consider the constitutionality of the procedure sanctioned by the New York Court of Appeals in the much discussed case of *Seider v. Roth*, 17 N. Y. 2d 111, 269 N. Y. S. 2d 99 (1966), as elaborated in *Simpson v. Loehmann*, 21 N. Y. 2d 305, 287 N. Y. S. 2d 633 (1967), motion for reargument denied, 21 N. Y. 2d 990, 290 N. Y. S. 2d 914 (1968). See also *Victor v. Lyon Associates, Inc., Hanover Ins. Co., Appellant*, 21 N. Y. 2d 695, 287 N. Y. S. 2d 424 (1967), appeal dismissed for want of a substantial federal question, —— U. S. ——, 37 L. W. 3131 (1968).

Marie Minichiello, a resident of New York, brought suit in the Supreme Court of New York for Schuyler County, in her own right and as executrix of her husband Thomas, to recover $205,050 for injuries to Thomas, for his death, for injuries to herself, and for damages to their car in an accident near Harrisburg, Pa., allegedly caused by the negligence of the defendant Rosenberg, a resident of Pennsylvania. An order of attachment was served at an office in New York on Allstate Insurance Co., which had

issued to Rosenberg in Pennsylvania a policy insuring against liability in an amount less than the recovery sought. Rosenberg removed the action to the District Court for the Western District of New York and there sought an order dismissing the complaint on the ground that the procedure sanctioned by *Seider v. Roth* violated the Federal Constitution. Judge Burke denied the motion[1] but later made the certificate required by 28 U. S. C. §1292(b). Since the problem was of obvious importance and the decision ran counter to Judge Croake's in *Podolsky v. Devinney*, 281 F. Supp. 488 (S. D. N. Y. 1968), we granted leave to appeal.

Elwin W. Stevens, a resident of New York, brought suit in the Supreme Court for Rensselaer County on his own behalf and as guardian for his son Dennis against Stephen Tyng, Sr., and Stephen Tyng, Jr., residents of Massachusetts, to recover $200,350 for injury to Dennis, loss of Dennis' services, and damage to a motor scooter sustained at Orleans, Massachusetts, as a result of the alleged negligence of Tyng, Jr., in driving a car owned by his father. Plaintiff attached a policy insuring against liability in the amount of $100,000 for any person and $300,000 for any accident issued outside New York by American Motorists Insurance Co., which does business in New York. Defendants removed the action to the District Court for the Northern District of New York and moved, *inter alia*, to dismiss the complaint for want of jurisdiction. Judge Ryan, sitting in the Northern District by designation, denied the motion[2] but, recognizing the contrary decision in *Podolsky*, made the certificate specified in 28

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1 Defendant also moved to dismiss the wrongful death claim as barred by the Pennsylvania statute of limitations. This motion was denied without prejudice to defendant's raising the point at trial, and we have not been asked to pass upon that ruling.

2 We have taken note of a similar decision by Judge McLean in the Southern District of New York in *Jarvik v. Magic Mountain Corp.*, 37 L. W. 2217 (1968).

U. S. C. §1292(b). Since the issue was identical with that already argued in *Minichiello v. Rosenberg*, we granted leave to appeal, with the case to be submitted on briefs.

Seider v. Roth was an action by New York residents against Lemiux, a Canadian, for injuries suffered in an automobile accident in Vermont.[3] Plaintiffs attached in New York a liability policy issued to Lemiux in Canada by Hartford Accident and Indemnity Co., which does business in New York. The Court of Appeals, speaking through Chief Judge Desmond, treated the problem solely as one of statutory construction, namely, whether "as soon as the accident occurred there was imposed on Hartford a contractual obligation which should be considered a 'debt' within the meaning of CPLR 5201 and 6202." The court answered this in the affirmative. Neither the majority opinion nor the dissent by Judge Burke, in which Judges Bergan and Scileppi concurred, adverted to constitutional doubts.

Seider v. Roth received a poor press from the commentators. See, e.g., Reese, The Expanding Scope of Jurisdiction over Non-Residents—New York Goes Wild, 35 Ins. Counsel J. 118 (1968); Comment, Attachment of "Obligations"—A New Chapter in Long-Arm Jurisdiction, 16 Buffalo L. Rev. 769 (1967); Comment, Garnishment of Intangibles: Contingent Obligations and the Interstate Corporation, 67 Colum. L. Rev. 550 (1967); Note, Seider v. Roth: The Constitutional Phase, 43 St. John's L. Rev. 58 (1968); Comment, Quasi in Rem Jurisdiction Based on Insurer's Obligations, 19 Stan. L. Rev. 654 (1967); and a number of comments by Professor David Siegel of St. John's University School of Law, one antedating the Court of Appeals' decision, which have appeared in the annual

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3 *Roth*, whose name will go down in legal history, is identified only as "the driver of a third car involved in the collision," 17 N. Y. 2d at 112, 269 N. Y. S. 2d at 100; it does not appear whence he came or whether any attempt was made to acquire jurisdiction over him.

supplements to CPLR §5201 in McKinney's Consolidated Laws of New York. In *Simpson v. Loehmann*, supra, 21 N. Y. 2d 305, 287 N. Y. S. 2d 633, the court was asked to reconsider *Seider v. Roth* not only as going beyond the New York attachment statutes but as offending the due process clause of the Fourteenth Amendment, imposing an undue burden on interstate commerce in insurance, and impairing the obligations of the policy. The court reaffirmed its earlier ruling. While only Judges Burke and Scileppi dissented from this, Judges Breitel[4] and Bergan concurred solely "on constraint of Seider v. Roth," saying that "only a major reappraisal by the court, rather than the accident of a change in its composition, would justify the overruling of that precedent," which, however, they severely criticized "if only, perhaps, to hasten the day of its overruling or its annulment by legislation."

On the constitutional claims, Chief Judge Fuld, writing for himself and Judge Van Voorhis, summarily disposed of the interstate commerce and impairment of contract obligation arguments, 21 N. Y. 2d at 309, n. 2, 287 N. Y. S. 2d at 635 n. 2. He then pointed out that under modern views the sufficiency of a basis for jurisdiction depends on "a practical appraisal of the situation of the various parties rather than an emphasis upon somewhat magical and medieval concepts of presence and power." 21 N. Y. 2d at 311, 287 N. Y. S. 2d at 637. He stressed the insurer's control of the litigation and that "where the plaintiff is a resident of the forum state and the insurer is present in and regulated by it, the State has a substantial and continuing relation with the controversy." Judge Keating, concurring, reasoned that New York could validly enact a direct action statute in favor of its residents for out-of-state accidents and that there was "no policy reason for

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4 Judge Breitel filled the vacancy created by Chief Judge Desmond's retirement. Subsequently, Judge Van Voorhis, who was in the majority in both *Seider* and *Simpson*, retired and has been succeeded by Judge Jasen.

not holding that service of process on the real party defendant—the insurer—is sufficient to compel it to defend in this State, provided it transacts business here and is thus subject to the jurisdiction of our courts." 21 N. Y. 2d at 312-14, 287 N. Y. S. 2d 638-40. Judges Breitel and Bergan found it unnecessary to deal with the constitutional issues since, on their view, "if the court was right in the *Seider* case, then there is no constitutional question," 21 N. Y. 2d at 316, 287 N. Y. S. 2d at 642. Judges Burke and Scileppi thought *Seider* was of doubtful constitutionality on any of the bases asserted in its support.

Although Judge Keating's opinion in *Simpson v. Loehmann* is more explicit than Chief Judge Fuld's on this score, it is reasonably clear that the Court of Appeals regards *Seider v. Roth* as in effect a judicially created direct action statute. The insurer doing business in New York is considered the real party in interest and the nonresident insured is viewed simply as a conduit, who has to be named as a defendant in order to provide a conceptual basis for getting at the insurer. See 1968 Commentary to CPLR §5201, paras. 88, 89. It is thus useful to address ourselves in the first instance to Judge Keating's premise that New York could constitutionally provide for a direct action against an insurer doing business in New York by a New York resident with respect to an injury suffered elsewhere. If that premise should fail, *Seider* would almost certainly fall with it. If it stands, we must then examine whether *Seider* may still be vulnerable because, unlike a true direct action statute, it involves the nonresident insured as a party defendant.

In *Watson v. Employers Liability Assurance Corp.*, 348 U. S. 66 (1954), the Supreme Court sustained Louisiana's direct action statute, which overrode contrary provisions in liability policies issued by insurers doing business in that state whether or not the policy had been written or delivered within it. The statute, however, applied only to accidents or injuries occurring in Louisiana.

The first set of considerations marshaled by Mr. Justice Black in favor of its validity, 348 U. S. at 72-73, would relate with equal force to one on behalf of residents. He stressed that "persons injured or killed in Louisiana are most likely to be Louisiana residents, and even if not, Louisiana may have to care for them. Serious injuries may require treatment in Louisiana homes or hospitals by Louisiana doctors. The injured may be destitute. They may be compelled to call upon friends, relatives or the public for help." On the other hand, his next argument, that "Louisiana courts in most instances provide the most convenient forum for trial of these cases," by its very terms could not apply. While the place of the plaintiff's residence may be a convenient forum for the trial of an action arising from an out-of-state accident in that not only he but much of the evidence of damages may be there, it will rarely be "the most convenient" one since the other witnesses to the accident are elsewhere—possibly far away.[5] But the Justice's final consideration—the plaintiff's difficulty in bringing the defendant before the forum—applies with even greater force to the state of plaintiff's residence than to that of injury in light of the development of long-arm statutes that will generally allow the state of injury to obtain personal jurisdiction of the insured and so avoid the need for a direct action against the insurer.

We thus believe that, all things considered, the Supreme Court would sustain the validity of a state statute permitting direct actions against insurers doing business in the state in favor of residents as well as on behalf of persons injured within it. See Note, Direct-Action Statutes: Their Operational and Conflict-of-Law Problems, 74 Harv. L. Rev. 357, 361 (1960). The state's interest in protecting its residents is as great as in the case of non-residents injured within the state. While the burden on

5. In *Victor v. Lyon Associates, Inc., Hanover Ins. Co., Appellant*, 21 N. Y. 2d 695, 287 N. Y. S. 2d 424 (1967), decided along with *Simpson* v. *Loehmann*, the accident took place in Vietnam.

the insurer in trying a case in a state other than the locus of the accident is heavier, there has been, as we have recently noted, "'a movement away from the bias favoring the defendant,' in matters of personal jurisdiction 'toward permitting the plaintiff to insist that the defendant come to him' when there is a sufficient basis for doing so," *Buckley v. New York Post Corp.*, 373 F. 2d 175, 181 (2 Cir. 1967), quoting Von Mehren & Trautman, Jurisdiction to Adjudicate: A Suggested Analysis, 79 Harv. L. Rev. 1121, 1128 (1966). Indeed, the Supreme Court may already have decided this point by dismissing *Hanover Ins. Co. v. Victor*, #50 Oct. T. 1968, "for want of a substantial federal question," see—— U. S. —— (1968), 37 L. W. 3131, although the order there sought to be reviewed would not seem to have been appealable under 28 U. S. C. §1257. Since, on the other hand, we doubt that the Court would sanction a direct action statute where the state was neither the place of injury nor the plaintiff's residence, we equally doubt whether *Seider* could validly be applied in such a case.[6]

With so much established, we turn to the question whether the position of the insured is as nominal as the New York Court of Appeals conceives. Here we proceed from the basis, apparently accepted by everyone, that the mere fact of a nonresident's having taken out liability insurance with a company doing business in New York would

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6 It would be a serious misreading of *Hughes* v. *Fetter*, 341 U. S. 609 (1951), and *First Nat'l Bank* v. *United Air Lines, Inc.*, 342 U. S. 396 (1952), to suppose that these cases would prohibit New York from creating a remedy against nonresident defendants in out-of-state accidents solely for its residents, particularly when an attempt to include nonresidents not injured within the state might make the remedy unavailable for anyone. Where neither party is a resident and the accident was out of state, a refusal to exercise jurisdiction would be a permissible application of *forum non conveniens*. See *Hughes* v. *Fetter*, supra, 341 U. S. at 612-13; B. Currie, The Constitution and the "Transitory" Cause of Action, in Selected Essays on the Conflict of Laws 282-360, and especially 320.

not be a sufficient contact to enable New York to render a judgment enforceable against other assets even at the suit of a resident.

In *Podolsky v. Devinney*, supra, 281 F. Supp. at 495-97, Judge Croake cogently argued that *Seider v. Roth* came close enough to this to constitute a denial of due process. He thought that, under the seemingly clear language of CPLR §320(c), if the insured defended on the merits, he would subject himself to *in personam* jurisdiction with consequent personal liability for any judgment in excess of the policy limits. On the other hand, if the insured did not defend and judgment was entered by default, the insurer should be able to resist a levy on the basis of the insured's non-cooperation. In cases where the plaintiff's claim exceeded the policy limits, *Seider* thus produced either a constitutionally unacceptable result or a nullity.

These difficulities were largely swept away by what has been termed "a miraculous per curiam opinion," see Commentary on CPLR §5201, at 15 (McKinney Supp. 1968), denying reargument in *Simpson v. Loehmann*, 21 N. Y. 2d 990, 290 N. Y. S. 2d 914 (1968). The Court of Appeals began by criticizing the argument just summarized, which had not been earlier advanced before it, as failing to take account of its statement, 21 N. Y. 2d at 310, 287 N. Y. S. 2d at 636, that the *Seider* doctrine did not "expand the basis for in personam jurisdiction in view of the fact that the recovery is necessarily limited to the value of the asset attached, that is, the liability insurance policy." The "miracle" lay in the next sentences:

"This, it is hardly necessary to add, means that there may not be any recovery against the defendant in this sort of case in an amount greater than the face value of such insurance policy *even though he proceeds with the defense on the merits*. Consideration of CPLR 320 (subd. [c]) and its effect in other types of action begun by attachment

must, of course, await future cases." (Emphasis supplied.)[7]

Appellants respond that while this unexpected construction of CPLR §320(c) protects the defendant in the New York *Seider* action, it does not fully meet the problem where as here the demands exceed the policy limits. Their fear is that if the plaintiff sues later for the unmet balance in a state where he has acquired jurisdiction *in personam*, a plaintiff's judgment in the New York *Seider* action will be taken to have adjudicated the defendant's liability. It

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7 Although Professor Siegel is doubtless right in saying that "not even a prophet would have guessed at this result if the statement had not been added," Commentary on CPLR §5201, at 17 (McKinney Supp. 1968), the "miracle" may not really have been so great. The Court of Appeals may have entertained qualms about the constitutionality of CPLR §320(c) both in the *Seider* situation and, as indicated by the last sentence of the quotation, in other instances of *quasi in rem* jurisdiction. There is substantial authority that where the presence of property within the state is the sole basis for jurisdiction, it is unfair to require the defendant to choose between forfeiting this and subjecting himself to liability for a larger claim. See *Cheshire Nat'l Bank* v. *Jaynes*, 224 Mass. 14, 112 N. E. 500 (1916); *Salmon Falls Mfg. Co.* v. *Midland Tire & Rubber Co.*, 285 Fed. 214 (6 Cir. 1922); *McQuillen* v. *Nat'l Cash Register Co.*, 112 F. 2d 877 (4 Cir.), cert. denied, 311 U. S. 695 (1940); *Miller Bros.* v. *State*, 201 Md. 535, 95 A. 2d 286 (1953), rev'd on other grounds, 347 U. S. 340 (1954). But see, *contra*, *Campbell* v. *Murdock*, 90 F. Supp. 297 (N. D. Ohio 1950); *Anderson* v. *Benson*, 117 F. Supp. 765 (D. Neb. 1953); *Sands* v. *Lefcourt Realty Corp.*, 35 Del. Ch. 340, 117 A. 2d 365 (1955); *United States* v. *Balanovski*, 236 F. 2d 298 (2 Cir. 1956), cert. denied, 352 U. S. 968 (1957). Although the commentators are likewise divided, several suggest that to deny the defendant an opportunity to defend without submitting to *in personam* jurisdiction violates due process. See Taintor, Foreign Judgment *in Rem:* Full Faith and Credit v. Res Judicata *in Personam*, 8 U. Pittsburgh L. Rev. 223 (1942); and B. Currie, Attachment and Garnishment in the Federal Courts, 59 Mich. L. Rev. 337, 379-80 (1961); cf. Restatement of Judgments §40 (1942). But see 2A Moore, Federal Practice ¶12.13 (2d ed. 1948 & Supp. 1967); Blume, Actions Quasi in Rem under Section 1655, Title 28, U. S. C., 50 Mich. L. Rev. 1, 22-24 (1951).

is plain that the New York judgment could not be given effect as such beyond the amount of the insurance; the troubling issue is whether a state could deem it effective as a collateral estoppel. Commentators have indicated that the due process clause prevents a state from giving a *quasi in rem* judgment such effect. Carrington, Collateral Estoppel and Foreign Judgments, 24 Ohio State L. J. 381, 384 (1963); Cramton & D. Currie, Conflict of Laws, 645-46 (1968); Developments in the Law—Res Judicata, 65 Harv. L. Rev. 818, 835 (1952). Accord, *Combs v. Combs*, 249 Ky. 155, 60 S. W. 2d 368 (1933); contra, *Harnischfeger Sales Corp. v. Sternberg Dredging Co.*, 189 Miss. 78, 195 So. 322 (1940). Other authorities have concluded that a *quasi in rem* judgment may work an estoppel on issues of fact that the defendant has actually litigated, at least where he has had a fair opportunity to do this. See Restatement of Judgments §76(2) (1942); Taintor, supra, 8 U. Pittsburgh L. Rev. at 235; cf. *Sherman v. Jacobson*, 247 F. Supp. 261, 266-67 (S. D. N. Y. 1963); *Sherman v. Kirshman*, 369 F. 2d 886, 890 (2 Cir. 1966). Whatever the right rule may be as to *quasi in rem* judgments generally, we think it clear that neither New York nor any other state could constitutionally give collateral estoppel effect to a *Seider* judgment when the whole theory behind this procedure is that it is in effect a direct action against the insurer and that the latter rather than the insured will conduct the defense. To be sure it may be cold comfort to a nonresident defendant to have our assurance that if some state should be so misguided as to consider a New York *Seider* judgment as concluding him, he will be able to have this ruling overturned by the Supreme Court of the United States. But we cannot fairly hold that New York has denied due process merely because of the possibility that some other state may do so.

We can foresee that application of *Seider* may produce other problems of due process. One may arise from CPLR 3110-1, which provides that a party must appear in New

York for the taking of his deposition. This has been held to apply to a nonresident defendant over whom jurisdiction has been obtained only by the *Seider* route, *Gazerwitz v. Adrian*, 28 A. D. 2d 556, 280 N. Y. S. 2d 233 (2d Dept. 1967). Nevertheless, if such a defendant declined so to appear despite the immunity from service of process that New York has long recognized,[8] we doubt that a default judgment could validly be entered. But we can hardly assume either that *Seider* plaintiffs will recklessly imperil their own recoveries by insisting on defendants' coming into the state or that, if they did, the Court of Appeals would not rescue them from their folly by reading into CPLR 3110-1 a conclusive presumption of hardship in *Seider* cases sufficient to excuse the defendants' appearing. Moreover, such matters are of no concern to the defendants here since service of subpoenas upon them is governed by F. R. Civ. P. 45. Problems may also arise about counterclaims if the pronouncement in the opinion denying reargument in *Simpson* as to the limited effect of an appearance in a *Seider* action does not cover their assertion. What would otherwise be the most serious difficulties in this area are removed by the absence of a compulsory counterclaim rule in New York, *Frank M. Herbert, Inc. v. M & P Scrap Iron & Metal Corp.*, 41 Misc. 2d 1020, 1024, 247 N. Y. S. 2d 193, 197 (2d Dept. 1964), and, so far as concerns these actions, by the careful exclusion in F. R. Civ. P. 13(a) of a case where "the opposing party brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim. . . ." The argument thus has to become that it is unfair to put a nonresident with whom New York has no real contact in a position where he can assert a counterclaim only at the price of exposing himself to liability above

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8 See *Parker* v. *Marco*, 136 N. Y. 585 (1893); *Bunce* v. *Humphrey*, 214 N. Y. 21 (1915).

the policy limits. But the insured would be in no position to assert a counterclaim under a direct action statute, and we do not now see how New York would deny him due process if it allowed him to assert one in a *Seider* action only at the risk of personal liability. In any event no such problem is presented here; we leave such questions and others that may be hypothesized for further consideration when they arise. It suffices for decision that the appellants have not demonstrated that refusal to dismiss the complaints will deny them the due process of law which the Fourteenth Amendment prescribes.

Appellants' argument based on the clause of the Constitution, Art. I, §10, clause 1, forbidding impairment of the obligation of contracts does not require extended answer. The argument is that a *Seider* attachment compels the insured to breach his pledge of cooperation by making the assertion of a defense too hazardous and thus jeopardizes his insurance coverage. But this contention has been drained of force by the *per curiam* opinion denying reargument in *Simpson*, 21 N. Y. 2d 990, 290 N. Y. S. 2d 914, which we have previously discussed.

Affirmed.

ANDERSON, *Circuit Judge* (dissenting)*:

I dissent. As the analysis of *Seider v. Roth*, 17 N. Y. 2d 111, 269 N. Y. S. 2d 99 (1966), and related cases in the majority opinion states, the *Seider* procedure is in effect a judicially created direct action statute that provides a New York plaintiff with a New York forum with respect to an injury suffered elsewhere, provided that *in personam* jurisdiction is obtained over the insurance company of the defendant. So regarded, the constitutional question presents itself as follows:

> May a state, which has in personam jurisdiction over an insurer and is the residence of the injured plaintiff, exercise jurisdiction in a tort case involving an accident which took place in a foreign jurisdiction and which was allegedly caused by a resident of that jurisdiction, to secure the proceeds of a liability policy issued in that foreign jurisdiction?[1]

The case which must provide the cue for the resolution of the issue is *Watson v. Employers Liability Insurance Corp.*, 348 U. S. 66 (1954). Considerations which governed the decision in that case appear in the following portion of the opinion:

> "Louisiana's direct action statute is not a mere intermeddling in affairs beyond her boundaries which are no concern of hers. Persons injured or killed in Lousiana are most likely to be Louisiana residents, and even if not, Louisiana may have to care for them. Serious injuries may require treatment in Louisiana homes or hospitals by Louisiana doctors. The injured may be destitute. They may be compelled to call upon friends, relatives, or the public for help. Louisiana has manifested its natural interest in the injured by providing reme-

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1 • Siegal, Supplementary Practice Commentary to N. Y. C. P. L. R., §5201, McKinney's Cons. Laws of N. Y., Book 7B at 41-42 (1968 Cum. Supp.).

dies for recovery of damages. It has a similar interest in policies of insurance which are designed to assure ultimate payment of such damages. Moreover, Louisiana courts in most instances provide the most convenient forum for the trial of these cases. But modern transportation and business methods have made it more difficult to serve process on wrongdoers who live or do business in other states. In this case efforts to serve the Gillette Company were answered by a motion to dismiss on the ground that Gillette had no Louisiana agent on whom process could be served. If this motion is granted, Mrs. Watson, but for the direct action law, could not get her case tried without going to Massachusetts or Illinois although she lives in Louisiana and her claim is for injuries from a product bought and used there. What has been said is enough to show Louisiana's legitimate interest in safeguarding the rights of persons injured there. In view of that interest, the direct action provisions here challenged do not violate due process."[2]

The majority compares the above quoted language with the *Seider* procedure and concludes that Louisiana's interest in protecting its medical creditors and in preventing the expenditure of public funds in the case of the injury of one of its residents in an out-of-state accident is as great as in the case of an accident occurring in Lousiana. This might be true if the plaintiff is hardy enough to reach Louisiana before requiring medical aid or public assistance; otherwise the state where the accident occurred would be required to pick up the tab. But I read this portion of Mr. Justice Black's opinion as stating certain pertinent examples of the interests which the state of the accident has, rather than as an exhaustive catalogue of those interests. It seems to me that there are other substantial interests of the accident state which do not coincide with

2 348 U. S. at 72-73.

those of the residence state. For example, one such traditional and significant interest, which the accident state may have in enacting a direct action statute, is to deter tortious conduct within the state.[3] Another is the fact that the accident state is often in a very real sense the center of the controversy with at least a greater statistical prob-

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3 Cf. *Schmidt* v. *Driscoll Hotel*, 249 Minn. 376, 82 N. W. 2d 365, 368 (1957): "The result [of refusing to allow suit in Minnesota] would be that here both the interest of Wisconsin in affording whatever remedies it deems proper for those injured there as the result of foreign violations of liquor laws, *Watson* v. *Employers Liability Assur. Corp.*, 348 U. S. 66 . . . , and the interest of Minnesota in admonishing a liquor dealer whose violation of its statutes was the cause of such injuries; and in providing for the injured party a remedy therefor under the civil damage act would become ineffective."

In *Watson*, the interests which were identified as significant in the *Driscoll Hotel* case (the interest of the accident state in affording a remedy to those injured and the interest of the state where the tortious conduct occurred in deterring such conduct) coincided in Louisiana.

The fact that the *Driscoll Hotel* case is a choice of law case rather than a legislative jurisdiction case is not a reason for rejecting reliance upon its interest analysis, because both methods of analysis focus on "contacts," or, in other words, the relation of the controversy to the community. See von Mehren and Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 Harv. L. Rev. 1121, 1166-67 (1966). In other words, the degree of interest necessary to make an exercise of legislative jurisdiction reasonable is greater than the degree of interest which is required to support a choice of law decision. Compare, *Hanson v. Denckla*, 357 U. S. 235, 253 (1958):

> "For the purpose of applying its rule that the validity of a trust is determined by the law of the State of its creation, Florida ruled that the appointment amounted to a 'republication' of the original trust instrument in Florida. For choice of law purposes such a ruling may be justified, but we think it is an insubstantial connection with the trust agreement for purposes of determining the question of personal jurisdiction over a nonresident defendant. The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum state."

ability that its residents will be more directly affected by any resolution of disputes arising from an accident within its territorial limits than the residents of any other state.

Moreover, as commentators have noted,[4] the second major argument of Mr. Justice Black also emphasizes the occurrence of the accident in Louisiana: "Louisiana courts in most instances provide the most convenient forum for trial of these cases." The opinion places great stress upon considerations of convenience in litigation, which point to the accident state, e.g., the availability of witnesses, the availability of police and medical records, the possibility of affording a jury an opportunity to view the scene of the accident, the ease of ascertaining the governing law, etc. By comparison, the convenience in carrying on the litigation which the majority ascribes to the residence state, is to say the least, a very one-sided accommodation. It would only be in the very small minority of these tort actions, transferred to the United States District Courts, as most of them will be, that the defendant could supoena witnesses who were within one hundred miles of the New York courthouse, and he would, in most cases be forced to prove his defenses through depositions.

Recognizing inconvenience of trial in New York courts as a vulnerable point in its argument, the majority seeks to offset it by the following *a fortiori* argument:

> "But the Justice's final consideration—the plaintiff's difficulty in bringing the defendant before the forum —applies with even greater force to the state of plain-

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4 See especially the excellent Comment, *Garnishment of Intangibles*, 67 Colum. L. Rev. 550, 559: "It is evident that the Court attached great importance to the occurrence of the accident within the forum state. These same factors—trial convenience and the forum's interest in protecting parties injured within its bounds—have been reiterated in more recent decisions concerning direct action statutes." [Footnote omitted.] See also Note, 74 Harv. L. Rev. 357, 389 (1960): "The occurrence of the accident in Louisiana was stressed by the Court in the *Watson* case."

> tiff's residence than to that of injury in light of the development of long-arm statutes that will generally allow the state of injury to obtain personal jurisdiction of the insured and so avoid the need for a direct action against the insurer."

Every plaintiff, however, is not entitled to a legal remedy in the form of a device to bring the defendant into the forum most convenient to the plaintiff and commensurate with the degree of difficulty which that effort entails, regardless of all other considerations. Certainly it must first be determined whether the plaintiff has the right to require defendant's presence in plaintiff's forum and the resolution of this question depends upon the fairness and reasonableness of the device as it affects all of the parties involved, the functioning of the courts, and the administration of justice in such an action. *Watson* and the long-arm statutes are plainly grounded in fairness because the nonresident defendant has of his own volition brought himself within the bounds and jurisdiction of the state where the accident occurred. But, for example, for a resident of Alaska, as the accident state, who had never resided elsewhere and who had never entered the State of New York or had any business there, suddenly to discover that he is under the jurisdiction of the State of New York and must go there to defend himself is quite a different matter. It is apparent from the Supreme Court's opinion in *Watson*, that "plaintiff's difficulty in bringing the defendant before the forum" is manifestly unjust only because the forum in question is "the most convenient forum." To repeat the passage under discussion:

> Moreover, Louisiana courts in most instances provide the most convenient forum for the trial of these cases. But modern transportation and business methods have made it more difficult to serve process on wrongdoers who live or do business in other states."

348 U. S. at 72.

The legislatures which have enacted long-arm statutes and courts which have interpreted them have been motivated and restrained by considerations of fairness and reasonableness. In deciding the due process issue,[5] as it relates to the *Seider* procedure, "traditional notions of fair play and substantial justice," *International Shoe Co. v. Washington*, 326 U. S. 310, 316 (1945),[6] must be used to determine whether or not it falls within permissible bounds. Weighed in this light, it seems to me that only the long-arm statutes asserting jurisdiction of the state where the accident occurred[7] qualify as due process, whereas the

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5 It should be noted that the *Seider* result could not have been reached under either of the legislatively-created direct action statutes, which permit a direct action only if the accident occurs within the state. Wis. Stat. Ann. §260.11 (Supp. 1966); La. Rev. Stat. Ann. §22.655 (Supp. 1965); *Koss* v. *Hartford Acc. & Indem. Co.*, 341 F. 2d 472 (7 Cir. 1965) (Wisconsin statute); *Guess* v. *Read*, 290 F. 2d 622 (5 Cir. 1961), cert. denied, 368 U. S. 957 (1962) (Louisiana statute); *Honeycutt* v. *Indiana Lumbermans Mut. Ins. Co.*, 130 S. 2d 770 (La. Ct. App. 1961) (Louisiana statute).

6 See von Mehren and Trautman, *op. cit. supra*, note 3 at 1166-67:

> "We believe that the approach in terms of reason and fairness brought to bear on jurisdiction over corporations and other legal persons by the International Shoe case, whose implications already have begun to be felt in the area of specific jurisdiction over nonresident individuals, will continue to be extended and refined. 'What policies should inform these developments and give content to 'reason' and 'fairness'? We submit that specific jurisdiction— with its characteristic feature of permitting the plaintiff to require the defendant to come, as it were, to him— is appropriate in two distinct classes of cases: (1) when the traditional jurisdictional bias in favor of the defendant is not justified; (2) when very strong considerations of convenience, relating not only to the plaintiff but also to the taking of evidence and other litigational considerations, point to a particular community."

7 Thus, in *Pugh* v. *Oklahoma Farm Bureau Mutual Insurance Co.*, 159 F. Supp. 155, 159 (E. D. La. 1958), Judge Wright, in holding that the Louisiana statute permitting suit against a non-resident

assertion of jurisdiction by the state of the plaintiff's residence does not.

The *Seider* procedure potentially subjects to liability to out-of-state process, a defendant whose activities, as noted above, may have been entirely local. It, therefore, may come as something of a shock to such a defendant, untutored in New York law, to discover that he is exposed to the traditionally high verdicts returned by New York juries. In *Watson*, on the other hand, the defendant was engaged in activity across state lines, and it was foreseeable to him that he should insure himself against potential liability in Louisiana. True, recovery in New York could not exceed the insurance proceeds, but if the actual verdict or judgment were in excess of the policy limits, would the defendant be equitably estopped from asserting that the damages were less than those found by the New York court, where the plaintiff sued on the judgment in a court outside of the State of New York?

In terms of fairness to the plaintiff, *Seider* involves by definition a plaintiff who is able to foresee that he may be injured in a foreign jurisdiction and compelled to litigate there. In *Watson*, however, the plaintiff's activity was local, and it was certainly much less foreseeable to her that she might be forced to go to Massachusetts or Illinois in order to recover for her local injuries.

A balancing of considerations of fairness to the parties, of litigational convenience, and of the interests of the state (which is to say the interest of its citizens) (1) in

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insurer by service of process upon the Secretary of State did not deny due process, stated:

> "The interest of the state in the safety of her highways, the care and hospitalization of persons injured thereon, the availability within the state of witnesses to the accident, the fact that Louisiana law will determine the liability for damages arising from the accident, . . . all combine to make certain that the maintenance of the suit within the state does not offend 'traditional notions of fair play and substantial justice.' Milliken v. Meyer, 311 U. S. 457, 463."

compensating the injured party, both for his own sake and to prevent him from becoming a public charge, (2) in compensating its medical and other creditors, and (3) in deterring tortious conduct, leads, on the one hand to a finding that a direct action statute in the state where an accident occurs is fair and reasonable in the due process sense. On the other hand, a similar weighing of interests leads to the conclusion that a direct action statute purporting to provide a New York forum for a New York plaintiff, regardless of other local contacts or considerations, is unreasonable and parochial in the due process sense. It is one thing to require a resident of Alaska to make trips to New York to respond to an action arising out of an accident with a resident of New York in New York State to which the Alaskan had gone, and quite another to make him do so for an accident which occurred in Alaska when the New Yorker elected to go to Alaska and use its highways.

The present case in its application deals only with a New York plaintiff, following the *Seider* procedure and its impact on a defendant in any of the other forty-nine states which happened to be the accident state. If its constitutionality is upheld, it is quite likely that all fifty states will be compelled to enact like measures. As a result each party will commence suit as quickly as possible in an endeavor to have the litigation in the state where he resides. It would also appear to be a natural and logical consequence of the approval of the *Seider* procedure that retaliatory laws will be adopted by other states to impose certain conditions upon residents from *Seider*-procedure states to protect the states' own residents from being subject to the jurisdiction of the foreign state. This is likely to impose a serious burden on interstate travel and commerce. It is also reasonably certain that the adoption of this procedure will work a substantial increase in the cost of insurance, which is not in the public interest.

It is my opinion that the *Seider* procedure violates due process and is, therefore, unconstitutional.

Petitions for Rehearing Before the United States Court of Appeals for the Second Circuit en Banc

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT:

In accordance with the provisions of Rule 35 and Rule 40 of the Federal Rules of Appellate Procedure, appellant Oliver Rosenberg, by his counsel, respectfully requests this Court to grant a rehearing before the Court *en banc* so that the Court may consider points of law and fact which appellant believes the majority of the hearing panel overlooked or misapprehended. Even a casual reading of the majority and dissenting opinions of the hearing panel discloses that the case involves questions of exceptional importance under the Federal constitution which divided the panel and which merit the attention of the entire Court.

SUMMARY OF REASONS FOR REQUESTING REHEARING EN BANC

1. *The shocking result approved by the decision of the majority of the hearing panel.*

As indicated in Judge Anderson's dissent, the majority's ruling is to this effect—that if any resident of any of the other forty-nine states is involved, in his home state, in an automobile accident with a New York driver who has driven into the other state, he must come to New York to defend any suit instituted by the New York driver, *provided only* that the nonresident's insurer has an office in New York State. The nonresident need not ever have been in New York; he need not have any contacts whatsoever with New York; the accident need not happen in New York; and his insurance policy need not have been issued or received in New York.

2. *The unusual course of reasoning by which the majority justified its conclusion.*

As indicated by the caption, the only defendant in this case is Oliver Rosenberg, an individual resident of Pennsylvania.

Yet the majority's decision that this suit can be maintained against Rosenberg is not based on his presence in New York—he was not in New York at any relevant time. It is not based on attachment of any of his property in New York—there is none. It is not even based on "attachment" of his rights of defense and indemnity against the insurer which the New York Court of Appeals held to be an "attachable debt" supporting *quasi-in-rem* jurisdiction.

The majority's decision is instead based on its prediction that the Supreme Court of the United States would approve a "direct action statute" permitting, on these facts, a direct suit in New York against the *insurer*—who is not even a party to this action.

Ignoring the fact that the New York legislature has never enacted such a statute and that the Supreme Court has never reviewed (much less approved) such a statute, the majority nevertheless concluded that permitting a *recovery* in New York against the nonresident for no more than the face of his policy (purchased and delivered in Pennsylvania) would not deny him due process; advised the nonresident that if New York or any other state courts honored any New York *judgment* in excess of the policy limits, the Supreme Court of the United States would reverse it; and noting that the final "argument then has to become that it is *unfair to put a nonresident with whom New York has no real contact in a position where he can assert a counterclaim only at the price of exposing himself to liability above the policy limit*," answered that argument by saying, "But the insured would be in no position to assert a counterclaim under a direct action statute, and we do not see how New York would deny him due process if it allowed him to assert one in a *Seider* action only at the risk of personal liability". (Emphasis added).

Thus by labelling a suit against only the nonresident

Rosenberg as a suit against his insurer, under a non-existing "direct action statute" the majority has established a rule that if any resident of any state other than New York is involved, at home, in an accident with any New York driver who chooses to drive into the nonresident's home state, the nonresident can be forced to defend a suit in New York, a state with which he personally has had no contacts at all.

Appellant submits that when such a shocking result is reached in such an unusual manner, a review by the Court *en banc* is required in the interests of sound judicial administration, as well as the interests of justice.

3. Finally, a decent respect for the thoughtful and well-reasoned views developed in the dissenting opinion of Judge Anderson would dictate that the contrary view not become the position of this Circuit without receiving the careful consideration of the other judges.

OUTLINE OF THE OPINIONS OF THE JUDGES WHO HEARD THE CASE

This appeal by Oliver Rosenberg was heard originally by a panel consisting of Judges Friendly, Anderson and Feinberg.

The decision for affirmance was joined by Judges Friendly and Feinberg, in an opinion by the former.

Judge Anderson dissented, with opinion.

The majority upheld the *Seider v. Roth* attachment procedure over appellant Rosenberg's contention that to do so would violate his right to due process of law under the Fourteenth Amendment to the Federal Constitution and his right to be free from the impairment of the obligations of a contract, prohibited by Article I, §10, cl. 1 of that Constitution.

The majority first stated (page 581) that the New York Court of Appeals "regards *Seider v. Roth* as in effect a *judicially created* direct action statute," and that "The

insurer doing business in New York is considered the real party in interest and the nonresident insured is viewed simply as a conduit, *who has to be named as a defendant in order to provide a conceptual basis for getting at the insurer*" (Emphasis added).

The majority then concluded (pages 581-583) that *Watson v. Employers Liability Assurance Corp.*, 348 U. S. 66 (1954), approving a direct action suit by Louisiana residents against an insurer (which had accepted Louisiana's direct action statute before the policy was issued) seeking damages on account of an incident occurring in Louisiana, indicated that the Supreme Court would also approve a direct action statute permitting such actions against an insurer in the state of plaintiff's residence, even though that state was not the place of injury or of issuance of the policy; the policy was issued before the New York Courts "created" the statute; and the insured defendant had no contacts with the forum state.

Agreeing that the mere fact of the insurer's presence in New York could not constitutionally justify a judgment enforceable against assets of the insured other than his rights under the policy, the majority then concluded that, since the New York Court of Appeals had declared that there could be no *recovery in New York* greater than the face amount of the policy, none of the nonresident's other assets were prejudiced. This was said to be so because "whatever the right rule may be as to *quasi in rem* judgments generally, we think it clear that neither New York nor any other state could constitutionally give collateral estoppel effect to a *Seider* judgment when *the whole theory behind the procedure is that it is in effect a direct action against the insurer and that the latter rather than the insured will conduct the defense*" (Emphasis added). (Pages 586-7) But the majority added, "To be sure it may be cold comfort to a nonresident defendant to have our assurance that if some state should be so misguided as to consider a New York *Seider* judgment as concluding him, he will be

able to have this ruling overturned by the Supreme Court of the United States. But we cannot fairly hold that New York has denied due process merely because of the possibility that some other state may do so." (Page 587).

Noting that, despite the assertion by the New York Court of Appeals that the insured can lose only the face value of the policy (21 N. Y. 2d 990, 290 N. Y. S. 2d 914), "problems may also arise about counterclaims," the majority then replied, "But the insured would be in no position to assert a counterclaim under a direct action statute, and we do not now see how New York would deny him due process if it allowed him to assert one in a *Seider* action only at the risk of personal liability." (Page 588).

Finally, the majority took note of appellant's contention that the *Seider* rule puts him to the unconstitutional choice of either submitting to personal jurisdiction or having his insurance coverage cancelled for non-cooperation, since the New York Court of Appeals had said that if the insured did not appear for a defense, the insurer could disclaim (citing New York law). The majority answered this contention by merely referring to the New York Court of Appeals' statement that, even if the insured defends on their merits, he cannot lose more than the face of his policy (pages 588-9). And so the majority affirmed the judgment.

Judge Anderson, in dissent (page 589), noted the majority's premise that "the *Seider* procedure is in effect a judicially created direct action statute that provides a New York plaintiff with a New York forum with respect to an injury suffered elsewhere, provided that *in personam* jurisdiction is obtained over the insurance company of the defendant." He then said, "So regarded, the constitutional question presents itself as follows:

> "May a state, which has in personam jurisdiction over an insurer and is the residence of the injured plaintiff, exercise jurisdiction in a tort case involving an accident which took place in a foreign jurisdiction and

which was allegedly caused by a resident of that jurisdiction, to secure the proceeds of a liability policy issued in that foreign jurisdiction?" (Page 589)

Judge Anderson then noted his disagreement with the majority's view that the Watson case presaged Supreme Court approval of a direct action suit based solely on plaintiff's residence in the forum, calling attention to the Supreme Court's emphasis on the fact that the incident involved in the *Watson* case happened in Louisiana, to a Louisiana resident, facts which gave rise to compelling state interests as well as of considerations of fairness, which eliminated that *insurer's* due process arguments in that case.

Judge Anderson also disagreed with the majority's apparent belief that every plaintiff is, as Judge Anderson characterized it, "entitled to a legal remedy in the form of a device to bring the defendant into the forum most convenient to the plaintiff and commensurate with the degree of difficulty which that effort entails, regardless of all other consideration" (page 593).

Judge Anderson said that

"Certainly it must first be determined whether the plaintiff has the right to require defendant's presence in plaintiff's forum and the resolution of this question depends upon the fairness and reasonableness of the device as it affects all of the parties involved, the functioning of the courts, and the administration of justice in such an action. *Watson* and the long-arm statutes are plainly grounded in fairness because the nonresident defendant has of his own volition brought himself within the bounds and jurisdiction of the state where the accident occurred. But, for example, for a resident of Alaska, as the accident state, who had never resided elsewhere and who had never entered the State of New York or had any business there, suddenly to discover that he is under the juris-

> diction of the State of New York and must go there to defend himself is quite a different matter. It is apparent from the Supreme Court's opinion in *Watson*, that 'plaintiff's difficulty in bringing the defendant before the forum' is manifestly unjust only because the forum in question is 'the most convenient forum'" (pages 593-4).

With respect to the due process issue raised by the *Seider* procedure, Judge Anderson noted that subjecting a nonresident to suit in a foreign jurisdiction with which he has never had any ties violates the "traditional notions of fair play and substantial justice" set up as standards by cases like *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). He also expressed doubt that the defendant could even argue, when sued on a New York judgment, that the damages were actually less than the amount of that judgment.

Judge Anderson, agreeing that although a direct action statute in the *accident state* might be fair and reasonable in the due process sense, pointed out that

> "On the other hand, a similar weighing of interests leads to the conclusion that a direct action statute purporting to provide a New York forum for a New York plaintiff, regardless of other local contacts or considerations, is unreasonable and parochial in the due process sense. It is one thing to require a resident of Alaska to make trips to New York to respond to an action arising out of an accident with a resident of New York in New York State to which the Alaskan had gone, and quite another to make him do so for an accident which occurred in Alaska when the New Yorker elected to go to Alaska and use its highways" (page 596).

Finally, Judge Anderson said that, in his opinion, the *Seider* procedure violates due process and is therefore unconstitutional.

THE MAJORITY'S CONFUSION CONCERNING THE QUESTION INVOLVED

One indication of the necessity for a rehearing before the Court *en banc* may be found in the difference between the "questions presented" by the parties to the hearing panel, and the questions posed and answered by that panel.

"The Question," as stated in Appellees' Brief (page 2), is as follows:

> "Whether within the confines of due process an automobile liability insurance policy may be viewed as a debt subject to attachment."

Similarly, the "Question Involved" stated in Appellant's Brief (page 1) may be paraphrased as follows:

> Whether or not, consistent with due process, a nonresident driver may be compelled to either defend a negligence suit instituted in New York by a New York resident after an accident in Pennsylvania, or suffer a default judgment and prejudice his insurance coverage by refusing to submit to New York's asserted jurisdiction, which is based solely on a construction of New York CPLR §85201 and C202 (the *Seider* case) converting into an attachable "debt" the nonresident driver's right to call on his insurer (doing business in New York) to defend him in negligence suits and indemnify him for any adverse judgments.

By contrast, the questions posed and answered by the majority of the hearing panel are significantly different. They are, in the order stated by the majority:

> 1. Whether or not the Supreme Court would sustain the validity of a statute permitting direct actions against insurers doing business in the state in favor of residents as well as on behalf of persons injured within it (page 582).

2. Whether or not the Supreme Court would sanction a direct action statute where the state was neither the place of injury nor the plaintiff's residence (page 583).

3. Whether or not the mere fact of a nonresident's having taken out liability insurance with a company doing business in New York would be a sufficient contact to enable New York to render a judgment enforceable against other assets even at the suit of a resident (page 584).

4. Whether or not New York or any other state could constitutionally give collateral estoppel effect to a *Seider* judgment when the whole theory behind this procedure is that it is in effect a direct action against the insurer and that the latter rather than the insured will conduct the defense (pages 586-7).

The majority answered this fourth question in the negative but noted "To be sure it may be cold comfort to a nonresident defendant to have our assurance that if some state should be so misguided as to consider a New York *Seider* judgment as concluding him, he will be able to have this ruling overturned by the Supreme Court of the United States. But we cannot fairly hold that New York has denied due process merely because of the possibility that some other state may do so" (pages 586-7).

Thus, in a case where the insurer is not a party, the majority answered questions about New York's actual attachment statute with answers based on an admittedly non-existent but "judicially created" "direct action" statute, and then affirmed the judgment on the basis of those answers. This reliance on what the legislature could do but has not done is a long way from Mr. Justice Holmes' view that, in interpreting a statute, "we do not inquire what the legislation meant; we ask only what the statute means."

Here the majority based its decision on its finding of validity of a statute which the legislature of New York

never passed, tested against the panel's prophecy that the Supreme Court would uphold it if it had been passed and applied to a situation completely different from any which the Supreme Court has ever had before it.

REASONS FOR GRANTING A REHEARING BEFORE THE COURT EN BANC

1. Both the majority and the dissenting judges recognized that the case involves serious questions under the due process clause of the Federal Constitution, and the panel was hopelessly divided with respect to the answers to those questions.

2. The majority has considered and decided the case as though this suit was against an insurer—whereas the insurer is not a party of record in this case, nor could it be under the actual New York law (there being no direct action statute). The only defendant sued by plaintiff was Oliver Rosenberg, who is also the only appellant before this Court.

3. The majority opinion reflects no consideration whatsoever of the due process arguments voiced by the individual defendant-appellant, a nonresident of New York, now ordered to either submit to New York's jurisdiction or jeopardize his insurance coverage. The majority did not discuss, much less distinguish, the authorities relied upon by appellant—such as: *Hanson v. Denckla*, 357 U.S. 235 (1958); *Hartford Accident & Indemnity Co. v. Delta & Pine Land Co.*, 292 U.S. 143 (1934); *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930); *McDonald v. Mabee*, 243 U.S. 90 (1917); and others of similar import and significance.

4. In relying on *Watson v. Employers Liability Insurance Corp.*, 348 U.S. 66 (1954), the majority either overlooked or completely misapprehended the following decisive factors present in *Watson* but not present in the instant case:

(a) In Watson, the injury happened to a Louisiana resident, in Louisiana, the forum state (348 U.S. 67, 72).

In this case, the injury occurred in Pennsylvania, *not* in New York, the forum state.

(b) In *Watson*, the statute involved was in effect before the policy was written (348 U.S. 70).

In this case, the earliest date on which this "judicially-created" statute could have been in effect was when *Seider v. Roth* was decided in March of 1966, long after this policy was written and long after the injury occurred.

(c) In *Watson*, the statute required the suit to be brought in the parish in Louisiana where the injury occurred or in the parish in Louisiana where the insured resided (348 U.S. 68, note 4).

In this case, the Court of Appeals has approved a suit filed in a state which has no direct action statute, in which the injury did *not* occur, in which the insured does *not* reside, and in which the policy was neither written nor delivered.

(d) In *Watson*, the insurer had agreed in writing to the application of the statute (348 U.S. 68-69, and note 5).

In this case, there is no actual statute and the insurer has therefore never consented to any "direct action" proceedings and appellant, the named defendant, never submitted to the jurisdiction of New York.

In brief, the *Watson* case would not be authority for a suit in New York even against the *insurer* in this case, much less the *insured*, who is the only defendant sued here.

Indeed, in *Watson*, the Supreme Court noted that, since the insured apparently could not be served in Louisiana, "Mrs. Watson, but for the direct action law, could not get her case tried without going to Massachusetts or Illinois

although she lives in Louisiana and her claim is for injuries from a product bought and used there." 348 U.S. 72-73. This statement demonstrates that the Supreme Court would not permit this suit against a nonresident defendant based on an accident happening outside the forum state. Even in *Watson*, where the plaintiff was a resident of Louisiana, and the injury occurred in Louisiana, *the Supreme Court said the plaintiff could not sue the nonresident defendant there.*

5. Under the rule announced by the majority of the hearing panel, if a resident of any state in the Union collides, in front of his own home, with a resident of New York, the latter can drag him across the country and into the New York courts to defend a suit for damages at least up to the limits of his insurance coverage. This is not only shocking but completely contrary to the basic rules of constitutional law established in the authorities cited and quoted in appellant's brief on the merits, which is hereby incorporated herein by reference.

6. The majority also abandoned the proposition that the insurer's obligation to defend and indemnify the insured, under a policy purchased and issued in Rennsylvania, amount to a "debt" attachable in New York and satisfying due process requirements, even though this was the basis for the New York Court of Appeals' approval of this "*Seider*" procedure. The unwillingness of the majority of the hearing panel to face this issue is readily understandable in the light of Judge Burke's compelling dissents in *Seider v. Roth*, 17 N.Y. 2d 115, and in *Simpson v. Loehmann*, 21 N.Y. 2d 316, as well as Judge Breitel's opinion in the latter case, 21 N.Y. 2d 314, which are hereby incorporated herein by reference. Without any property of the nonresident insured—the sole defendant—in the state, there is no basis for jurisdiction over him, *Cooper v. Reynold's Lessee*, 77 U.S. (10 Wall) 308 (1870); *Black v. Zacharie & Co.*, 44 U.S. (3 How.) 483 (1845); *McDonald v. Mabee*, 243 U.S. 90 (1917); *Hanson v. Denckla*, 357 U.S. 235 (1958), and the entire proceeding is a nullity.

Conclusion

For all the foregoing reasons, and because of the compelling considerations set out in the dissenting opinion of Judge Anderson, this Petition For Rehearing Before The Court *En Banc* should be granted.

Respectfully submitted,

JAMES M. MARSH
D. BRUCE CREW, III
Attorneys for Appellant

To the Honorable Judges of the United States Court of Appeals for the Second Circuit:

In accordance with the provisions of Rule 35 and Rule 40 of the Federal Rules of Appellate Procedure, the appellants Stephen H. Tyng, Sr. and Stephen H. Tyng, Jr. respectfully request this Court to grant a rehearing before the Court *en banc* so that the court may consider points of law and fact which the appellants believe the majority of the hearing panel overlooked or misapprehended.

A reading of the majority and dissenting opinion of the hearing panel as well as a reading of the case of *Seider v. Roth* 17 NY 2d 111 as elaborated in *Simpson v. Loehmann* 21 NY 2d 305, reargument denied 21 NY 2d 990 discloses the serious federal constitutional question involved which merits the attention of the entire court.

The finding of the majority of the hearing panel substantially determined that *Seider v. Roth*, in effect, judicially created a *direct action statute* within the State of New York and that the insurer doing business in the State of New York is the real party in interest; that the *non-resident insured is simply a conduit who has to be named as a defendant in order to provide a conceptual basis for getting at the insurer*. It is the contention of appellants that the court has misapprehended the constitutional effect

of such a judicially enacted procedure by overlooking the effect on the party defendants and treating their rights as insignificant. They failed to consider "due process" as to them.

Chief Judge Fuld writing in 21 NY 2d 305 in *Simpson v. Loehmann* at page 311 stated:

> "The historical limitations on both in personam and in rem jurisdiction, with their rigid tests, are giving way to a more realistic and reasonable evaluation of the respective rights of plaintiffs, defendants and the State in terms of fairness. (See, e.g., *International Shoe Co. v. Washington*, 326 U. S. 310; *McGee v. International Life Ins. Co.*, 355 U. S. 220; *Longines-Wittnauer Watch Co. v. Barnes & Reinecke*, 15 N Y 2d 443.) Such an evaluation requires a practical appraisal of the situation of the various parties rather than an emphasis upon somewhat magical and medieval concepts of presence and power."

The majority of the hearing panel also stressed this point and then followed the Court of Appeals of the State of New York by resting its decision upon the very magical and medieval concepts of presence and power that the New York Court of Appeals by its own lip service indicated was outdated. As a matter of fact, Judge Friendly referred to the "miracle" of *Simpson* (which like "magic" is *supernatural*).

Jurisdiction, regardless of the high-sounding semantic phrases to the contrary, must of necessity spring from presence and power, otherwise the law would lack sanction. It is always hoped, however, that the courts will not abuse their power by improper archaic sanctions.

The doctrine of *Seider v. Roth* is the very exercise and realization of a medieval concept of presence and power. It forces the will of the court on nonresidents by cunning and subtle pressure while at the same time paying lip service to its fairness and modernism. By its very nature the

Seider doctrine is an arbitrary exercise of power over a garnishee which directly results in an infringement of the fundamental rights of fairness and the right of "due process" to the named defendants.

It is easy for a court to decree that because it is the insurance company that they compel to pay, that the party defendant is deprived of nothing. Sufficient is it to say, that if a nonresident is deprived of his insurance coverage because of the laws of the State of New York which are conceptually in conflict with the laws of his own state, he has suffered severely, i.e. New York does not recognize guest statute (*Babcock v. Jackson* 12 NY 2d 473), limitation on death actions (*Kilberg v. Northeast Airlines* 9 NY 2d 34), charitable immunity, and has its own notions of law in many fields which are not shared by the rest of the world.

Let us look at the effect of the State of New York's refusal to recognize limitations on death actions. If an accident occurs in a foreign state where there is a limitation on recovery and this is the state with which a defendant has contacts, the usurpation of a defendant's policy by the State of New York which might result in a verdict in an amount greater than he would have had to pay in the state of the accident deprives him of his property and may result in lack of sufficient coverage to protect him in his home state when he is later sued. Coverage might have been sufficient to protect him had the proceedings been brought in the jurisdiction with which he had contacts and where the accident occurred and may very well be insufficient to protect him after the application of jurisdiction over the insurance carrier in the State of New York. *Miller v. Miller* 22 NY 2d 12 is an example of our so-called modern fairness and a usurpation of an insurance policy for parochial purpose.

The determination that there is "a movement away from the bias favoring the defendant in matters of personal jurisdiction towards permitting the plaintiff to insist

that the defendant come to him when there is a sufficient basis for doing so" while true, is not substantiated by the facts in this case. As Judge Anderson stated in the dissent, "Certainly it must first be determined whether the plaintiff has the right to require the defendant's presence in plaintiff's forum and the resolution of this question depends upon the fairness and reasonableness of the device as it affects all of the parties involved, the functioning of the courts, and the administration of jurisdiction. . . ." In this case there is no reason why the defendant should come to the plaintiff. When the accident occurred the plaintiff was temporarily residing in the State of Massachusetts. The defendant resided in Massachusetts. The insurance policy was not issued in New York. The defendant had actually no contacts whatever with the State of New York other than the fortuitous circumstance that he was insured with a carrier doing business in the State of New York. While New York and Massachusetts are adjacent to one another, the situation would be the same if the plaintiff lived in any foreign country (or even as far away as Alaska or Hawaii).

It was the plaintiff who found his way to the jurisdiction of the defendant to have his accident. It is not unreasonable to ask him to return to the place he voluntarily resided and earned his living to try his lawsuit. Such is the basic determination in the *Watson et ux. v. Employers Liability Assurance Corporation Ltd.* 348 U. S. 66 (1954) case or in cases involving the long arm statutes where jurisdiction is based upon doing business in a foreign state, traveling in a foreign state, or placing in commerce products with the intent that they be introduced into that foreign state. It is the contention of the appellants that the majority of the hearing panel has misunderstood the impact of Watson.

The further misapprehension of the court is that while form in and of itself is not necessarily the criterion of all substantive issues or constitutional rights, that never-

theless the procedure must be reasonably calculated to fairly accomplish a just result.

Seider by its very nature is unfair because cases are necessarily tried away from the area where the witnesses may be produced. A case lost or an excessive verdict based on lack of a witness certainly could eliminate all coverage a defendant might have and have an effect on the defendant far more disastrous than on the carrier.

When a defendant's insurance coverage is reduced by any means he is directly affected. Judge Breitel made this patently clear when he wrote in *Simpson* "As for the effect of the rule, the practical consequences are highly undesirable. This state, and particularly its chief city, is the mecca for those seeking high verdicts in personal injury cases." If every plaintiff may invoke any high verdict jurisdiction provided, he is a resident of the jurisdiction at the time the action is commenced (see *Miller v. Miller* supra) and regardless of the contacts of the defendant with the jurisdiction, then the defendant's insurance coverage may become subject to the whim of every jurisdiction in the world with which he has no contact merely because he is insured. He may very well be left unprotected in his own jurisdiction. This is hardly a desirable or a fair result. This is a result based solely upon the abuse of power, and the mere presence of an insurer, which the New York Court of Appeals indicated is medieval and old fashioned.

It is the contention of the appellants that the majority of the hearing panel rested its decision on a basis that if the Legislature of the State of New York passed a direct action statute giving extraterritorial effect to it and that if the carrier had consented to such a procedure, that *Watson* determined such a procedure to be fundamentally fair. The Legislature, however, did not pass such a direct action statute; no carrier has consented to such procedure. The tort was not committed within the State of New York nor was the injury incurred within the State of New York as was *Watson's* within Louisiana.

Judge Keating, when he wrote in *Simpson*, placed the rationale of *Watson* on the place of injury indicating that the place of the tort or the place of injury would be the proper constitutional justification. He stated:

> "The constitutional justification for subjecting the insurer to such liability arises *not per se because the accident took place* in Louisiana but because the occurrence of the accident gave rise to a legitimate governmental interest which Louisiana has in protecting the rights of those *persons injured within its borders.*"

The judicially created procedure not only went beyond any direct action statute or long arm statute that has been passed, but used a device which is so fictional and inappropriate that the courts, judges, and even the Law Revision Commission of the State of New York do not comprehend or agree on its theory or its ramifications. In the *Thirteenth Annual Report of the Judicial Conference of the State of New York* (1968) on page 128, Professor David D. Siegel reports, "The differing opinions tendered by the judges on the various problems *Seider* presents confirm that it is somewhat of a hornet's nest in practice . . . Time precludes any review of the *Seider* discussion here, but since the judges came to nothing that could be described as agreement on any problem raised by Seider, there would be no consensus to report in any event."

Law to be fundamentally fair must be reasonable, understandable and practical. It must meet the test of "traditional notions of fair play and jurisdiction." *International Shoe Co. v. Washington* 326 U. S. 310. The determination of the constitutionality of *Seider* can only result in a legal hodgepodge of forum shopping by plaintiffs with the defendants' rights being constantly jeopardized by a foreign state with which he has no connection. The foreign state will utilize the defendant's coverage on a purely parochial basis as have the courts of the State of New York, leaving the defendant to fend for himself in his own bailiwick with

his own assets and with his insurance coverage either completely utilized or depleted. Certainly such parochialism is medieval, magical and basically unfair to a defendant.

WHEREFORE, appellants respectfully request the Court to grant a rehearing before the Court *en banc* so that the serious constitutional issues outlined herein may be fully considered by all the judges.

Dated: January 8, 1969.

Respectfully submitted,

NEIL HESSON, JR.
BENDER, HESSON, FORD & GROGAN
Attorneys for Appellants

Order of the United States Court of Appeals for the Second Circuit Granting Petition for Rehearing

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant,

Upon consideration thereof, and a majority of the active circuit judges concurring, it is

Ordered that reconsideration in banc be had on the record and the briefs heretofore filed, together with such additional briefs as the parties may wish to file within twenty (20) days.

LUMBARD,
Chief Judge

January 15, 1969

Opinion, Concurring Opinion and Dissenting Opinion of the United States Court of Appeals for the Second Circuit

OPINION OF THE COURT

FRIENDLY, *Circuit Judge*, with whom WATERMAN, SMITH, KAUFMAN, HAYS and FEINBERG, *Circuit Judges*, concur:

After reconsideration *in banc* on the original and supplemental briefs, the court adheres to the affirmance of these orders, ——— F. 2d ———, slip opinions 575.

The burden of the petitions for rehearing is that the previous majority opinion was overly preoccupied with a conception of *Seider v. Roth*, 17 N. Y. 2d 111, 269 N. Y. S. 2d 99 (1966), as elaborated in *Simpson v. Loehmann*, 21 N. Y. 2d 305, 287 N. Y. S. 2d 633 (1967), motion for reargument denied, 21 N. Y. 2d 990, 290 N. Y. S. 2d 914 (1968), as "in effect a judicially created direct action statute,"[1] ——— F. 2d at ———, slip opinions at 581. Appellants complain we did not adequately focus on the bur-

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1 The only new point made with respect to the situation of the insurer is that in *Watson* v. *Employers Liability Assurance Corp.*, 348 U. S. 66 (1954), the insurer had consented in writing to the application of the direct action statute, and the statute had become effective before the insurance contract was made. 348 U. S. at 68-70. However, the Supreme Court made it clear, in upholding a provision of the Louisiana statute that authorized direct action regardless of consent, that "Lousiana has a constitutional right to subject foreign liability insurance companies to the direct action provisions of its laws whether they consent or not." *Id.* at 74. On the basis of this determination, it held there could be no constitutional objection to the supplemental provision requiring consent as a condition to doing business in the state. If we were right in believing that a New York direct action statute in favor of residents would be constitutional even as regards out-of-state accidents, the new point would thus be limited on any view to whether achieving the same result by judicial action creates a problem on the score of retroactivity with respect to policies issued before the *Seider* decision, at least where the insurer had no sufficient opportunity be-

den to a nonresident of having to defend a personal-injury action in another state, conceivably far from his domicile and the place of the accident, simply because his liability insurer has chosen to do business there.

We find this argument unpersuasive so long as *Harris v. Balk*, 198 U. S. 215 (1905), stands. Balk, a North Carolinian, had no more control over the preregrinations of his fellow-citizen, Harris, which caused the latter to be garnisheed in Maryland by Balk's alleged creditor, Epstein, than these appellants have over their insurer's decisions where to do business.[2] In contrast, appellants' problem is significantly less serious than was Balk's in several respects. Balk had to decide whether to hire a Maryland lawyer to protect his interest in the $180 debt Harris owed him; the appellants are entitled to have lawyers in New York furnished by their insurers without expense. The Maryland judgment deprived Balk of money he could have used for whatever purpose he willed; a *Seider* judgment would mean simply that liability policies, on which appellants could not have realized for any purpose other than to protect themselves against losses to others, will be applied to the very objective for which they were procured. Whatever Balk's situation may have been, appellants are assured that they may defend the New York actions without exposing themselves to personal liability and that any recovery by the plaintiffs "is necessarily limited to the value of the asset attached, that is, the liability insurance policy." *Simpson v. Loehmann*, 21 N. Y. 2d 990, 290 N. Y. S. 2d 914

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fore the accident to withdraw from doing business in New York. *Seider* plaintiffs would answer, among other things, that the insurers were on notice all along that CPLR §6202 was applicable. It would be premature to consider such questions in interlocutory appeals where only the insureds have appealed and the facts relevant to the situation of the insurers have not been fully developed.

2 While Harris could be in only one place at a time, this would not be true in cases where the debtor was a corporation. Indeed, even in the case of natural persons, the debt might be subject to garnishment at the same time both in the state of their residence and in that of their presence.

(1968), discussed at ——— F. 2d ———, slip opinions 584-85.

Appellants claim they are worse off than Balk in one respect, namely, that the cooperation condition of the policies forces them to come to New York and participate in the defense of the personal-injury actions, and that this is a serious inconvenience even though they are reimbursed for their expenses and, as we have concluded, will suffer no untoward consequences in the form of liability. We have previously noted that so far as judicially compelled attendance in New York is concerned, appellants are amply protected against undue inconvenience by F. R. Civ. P. 45(d) and (e). We are not required to determine whether refusal by the insured to attend a trial in a foreign state, when such attendance is not required by the applicable procedural law and he is willing to be deposed elsewhere, would constitute a material breach of the duty of cooperation even if a policy literally required him to appear in person. See Appelman, Insurance Law and Practice §§4773, 4784 (1962). For, as we understand *Simpson v. Loehmann*, supra, 21 N. Y. 2d at 309 n. 2, 287 N. Y. S. 2d 635 n. 2, the only consequence of such a breach would be to relieve the insurer of liability under the attachment.

We note a further point which at least mitigates some of the many undesirable practical consequences of *Seider*.[3] By their very definition actions of the *Seider* type will generally be removable to the federal courts,[4] or indeed

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3 These have recently been catalogued again at some length. See Stein, Jurisdiction by Attachment of Liability Insurance, 43 N. Y. U. L. Rev. 1075 (1968).

4 Exceptions would be where the amount claimed did not exceed $10,000; cases, doubtless quite rare, where a New Yorker was joined as a defendant; and perhaps cases where a citizen of the state of defendant's residence was appointed as a representative of a decedent or minor on whose behalf the action was brought. See *Mecom* v. *Fitzsimmons Drilling Co.*, 284 U. S. 183 (1931); but cf. *McSparran* v. *Weist*, 402 F. 2d 867 (3 Cir. 1968), taking a different view with respect to appointment of a resident of another state to create federal jurisdiction.

can be brought there. Once in federal court, they become subject to the salutary provision of 28 U. S. C. §1404(a) that "for the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." Either the district of the defendant's residence or that of the accident, or both, will qualify for transfer. Whenever a trial in New York would cause true hardship to the defendant, a remedy thus will almost always be at hand. See *Farrell v. Wyatt*, ——— F. 2d ——— (2 Cir. 1968), slip opinions 1515. While an influx of cases of this type into the federal courts is most unwelcome, we have here an unforeseen demonstration of the utility of diversity jurisdiction, by way of removal at the instance of a nonresident, to lessen the impact of an overly enthusiastic but not unconstitutional assertion of jurisdiction by another state. To be sure, if the Constitution demanded that a personal-injury claim be tried only at the place of the accident or the defendant's residence, the availability of a discretionary transfer by a court to which nearly all such actions can be removed would be an inadequate answer. But the availability of a procedure assuring that in almost all such cases the trial can take place in what a federal district judge deems an appropriate forum bears strongly on the issue whether the Constitution does demand such a general rule. The very fact that the discretion will not always be exercised in favor of transfer—as here in the *Stevens* case where the judge found that the preponderant issue was the extent of plaintiff's injury—sufficiently indicates that the places of accident or of defendant's residence are not always the only convenient fora. Cf. *Lykes Bros. S. S. Co. v. Sugarman*, 272 F. 2d 679 (2 Cir. 1959).

We add in conclusion that in these cases, where the accidents gave rise to what from a practical standpoint were single claims, we are not required to decide whether *Seider* might produce constitutionally impermissible re-

sults if applied so as to prefer one claimant over another in cases of multiple claims where the damages exceed the policy limits and the insured is without funds to pay the excess. We would hope that realization of the complexities of such problems and the considerations urged in our brother ANDERSON'S dissents might stimulate the reexamination of *Seider* intimated in *Simpson v. Loehmann, supra*, 21 N. Y. 2d at 312, 287 N. Y. S. 2d at 638 (opinion of Chief Judge Fuld), 21 N. Y. 2d at 814, 287 N. Y. S. 2d at 640 (concurring opinion of Judge Breitel), before the decision is taken up, perhaps only defensively, by other states.

Affirmed.

HAYS, *Circuit Judge* (concurring):

I concur in the result and in Judge Friendly's opinion.

I wish to add a word simply to emphasize a point which is taken for granted in both Judge Friendly's and Judge Anderson's opinions.

There is nothing in the character of attachment or of resulting *in rem* jurisdiction which would require that the procedure be available only to plaintiffs who are residents in the forum state. While in both *Seider* and *Simpson* the plaintiffs were residents of New York, nothing was decided in either of those cases which would deny to residents of states other than New York the procedure approved in the cases. In Judge Breitel's concurrence in *Simpson*, 21 N. Y. 2d 314 at p. 316[1] and in Judge Burke's dissent in the same case[2] a question is raised as to whether non-residents of New York may resort to the *Seider* procedure.

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1 "This State, and particularly its chief city, is the mecca for those seeking high verdicts in personal injury cases (see, e.g., Gilchrist v. Trans-Canada Air Lines, 27 A. D. 2d 524, 275 N. Y. S. 2d 394). On the basis of the rule in the *Seider* case, it will be the rare plaintiff who cannot invoke the jurisdiction of New York courts, even though only quasi in rem, since it will be a very small insurance company that does not have a palpable contact with State." In the *Gilchrist* case the plaintiffs were non-residents.

2 "Mere presence of the insurer in this State, which is all that *Seider* appears to require, based as it is on a highly formalistic in rem attachment approach, would not seem sufficient to establish such an interest,[2] [[2] Illustrative of the type of case *Seider* would appear to invite into our courts is the *Vaage case* (see Nationwide Ins. Co. v. Vaage, 265 F. Supp. 556 [S. D., N. Y., 1967]). Vaage, a citizen and resident of Norway, has commenced, by means of a *Seider*-type attachment, an action in New York based upon an automobile accident in which he was involved in North Carolina. Defendant is a North Carolina resident and the liability policy was issued there. What purpose allowing suit to be brought here, other than possibly increasing Vaage's hoped for damage award, is beyond me.] and even if *Seider* is to be read as requiring that the plaintiff must have been a New York resident at the time of the accident,[3] [[3] This might pose a problem under the Federal Constitution if *Seider's* in rem basis were carried to its logical extreme. See Harris

Although I read Judge Friendly's opinion as finding the *Seider* procedure acceptable only when plaintiffs are residents of New York, I believe that it is worthwhile to put additional stress on this point and to make it completely clear that our opinion refers only to the situation where plaintiffs are New York residents.

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v. Balk (198 U. S. 215, 223-224, 25 S. Ct. 625, 49 L. Ed. 1023).] these would not seem sufficient additional circumstances to warrant interference with the rights and obligations of the parties to the out-of-State contract."

But see *Vaage* v. *Lewis*, 29 App. Div. 2d 315 (2d Dept. 1968).

ANDERSON, *Circuit Judge*, with whom LUMBARD, *Chief Judge*, and MOORE, *Circuit Judge*, concur (dissenting):

In view of the majority's strong reliance on *Harris v. Balk*, 198 U. S. 215 (1905), as a justification for brushing aside the argument of the appellants, on their motion for rehearing, that the majority holding places an unfair burden on a non-resident (thereby compelled to defend an action in New York, regardless of other contacts, provided only that *in personam* jurisdiction can be obtained over his insurance company) it is necessary to comment on the *Harris* case.

Assuming the continued constitutional viability of the *Harris* rule,[1] that the obligation of a debtor to pay clings to and accompanies him wherever he goes and that the debt is subject to garnishment in any state in which the debtor

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1 Several commentators have noted that *Harris* v. *Balk* is, from the point of view of modern jurisdictional thinking, an anachronism. E.g., von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 Harv. L. Rev. 1121, 1178 (1966); *Developments in the Law-State Court Jurisdiction*, 73 Harv. L. Rev. 909, 957-960 (1960). The following passage suggests that it may have outlived its usefulness:

> . . . *Harris*, in view of modern practice and theory, is not sacrosanct. The decision is from the *Pennoyer* era when the exercise of personal jurisdiction was severely circumscribed and the garnishment of intangibles served as a valuable substitute for personal jurisdiction. The formalism involved in determining the situs of the debt was necessary to spell out a presence within the forum so that "power" over the intangible could be exercised. Resort was had to the fiction that the debtor carried the debt with him so that it could be garnished whenever personal jurisdiction could be attained over him. The modern concept of personal jurisdiction leaves little justification for the garnishment of intangibles. Moreover, the formalism of the *Harris* approach is likely to result, as in *Seider*, in garnishment in a forum which has no substantial contact with or interest in the litigation. Advanced thinking has called for the abolition of *Harris*. *Note, Seider* v. *Roth: The Constitutional Phase*, 43 St. John's L. Rev. 58, 65, 66 (1968) ["St. John's Note"].

is subject to *in personam* jurisdiction,[2] nevertheless that case is clearly distinguishable from the procedure sanctioned by *Seider, Simpson, et al.* In the first place, the Supreme Court in *Harris* was considering "ordinary debts,"[3] whereas the complex package of rights and duties which derive from an automobile liability insurance policy is something quite different. The debt in *Harris* was fixed in amount, and concededly currently owed, but the *Seider* "debt," consisting of the obligations to defend and indemnify, is indefinite, not readily ascertainable in amount, and contingent, i.e. with respect to the obligation to defend, upon the obtaining of jurisdiction over and the commencement of suit against the insured, and also, with respect to the obligation to indemnify, upon the securing by the plaintiff of a judgment against the defendant insured. Moreover, as Judge Croake noted in *Podolsky v. Devinney*, 281 F. Supp. 488, 494 (S. D. N. Y. 1968), "the obligation to defend is an important right of the insurer, essential in protecting its financial interest in the outcome of the litigation." *Seider* is the first case ever to hold that an insurer's contractual obligations under an automobile liability policy are subject to foreign attachment and thereby furnish quasi in rem jurisdiction over a non-resident defendant. See the excellent article entitled "Jurisdiction by Attachment of Liability Insurance" by Malcolm L. Stein, 43 N. Y. U. L. Rev. 1075, Dec. 1968.

There is another distinction between *Harris* and *Seider*.[4] In *Harris* the debtor-garnishee, as a natural person, could be physically present in only one state at a time; therefore, although the situs of the debt might change, there

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2 198 U. S. at 222-223.

3 "We speak of ordinary debts, such as the one in this case." *Id.*, at 223.

4 These distinctions have not escaped other courts and commentators. E.g., *Simpson* v. *Loehmann*, 287 N. Y. S. 2d 633, 645-646 (1967) (Burke, J., dissenting); David D. Siegel, *Seider* v. *Roth; U. S. Courts Faced with Special Problems*, N. Y. L. J. March 14, 1969, p. 5, cols. 4-6; St. John's Note, *supra*, n. 1 at 66, 67.

could never exist more than one quasi in rem jurisdictional situs at any given time. In *Seider* the garnishee is an interstate corporation subject to jurisdiction in the state of incorporation as well as in the states where it is doinbg business. If *Seider* stands, other states will be compelled to follow New York's example by engrafting a *Seider* procedure onto their attachment statutes. The inevitable result will be a rash of contrary and inconsistent adjudications, particularly in multi-party cases, well described by Professor Siegel as "jurisdictional chaos." He says:

> "Balk at least enabled a single state to be isolated as the situs of the intangible. Under Seider, that is not possible; all of the states in which the insurer does business could seize the policy; and if they were to do so (i.e. adopt Seider) there would be a kind of jurisdictional chaos awaiting in major accident cases.
>
> * * * * *
>
> Suppose the other states do adopt it? If all of them can then lay claim to being the 'situs' of the policy to the same extent that New York makes that claim under Seider, it is not difficult to contemplate a race-to-attach (or seize or sequester or secure 'trustee process' or whatever else a state may call the quasi in rem process that goes under the name of 'attachment' in New York) in multi-party accidents."[5]

The rule of *Harris*, which in effect sanctions the mere presence of the garnishee as a sufficient jurisdictional base, "cannot be justified in terms of fairness." *Developments in the Law-State Court Jurisdiction*, 73 Harv. L. Rev. 909, 960 (1960). In other words, the relevant contact with the forum state which establishes a jurisdictional base is not attuned to the modern jurisdictional search to attain substantial justice by balancing interests.

The majority opinion is quite correct in observing that the *Harris* rule imposed a substantial burden on Mr. Balk

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5 Siegel, *loc. cit.* col. 4.

in forcing him to litigate, if he should elect to contest, wherever his debtor's peregrinations might take him. It does not follow that if Balk was treated unfairly, then appellants can be treated with a much greater degree of unfairness. The unstated assumption that *Harris* controls the case at bar should be rejected. In view of the age of that case, the revolution in jurisdictional thinking since 1905 and the criticism of its potential unfairness in modern terms,[6] the rule of that case should be confined to its facts, and applied only in cases where there is a fixed obligation, when the amount may be determined with fair certainty and any contingency concerns nothing more than time of maturity.

Exception must also be taken to the majority's view that the availability of removal under §1404(a) "bears strongly" on the decision of the constitutional issue. The constitutionality of this procedure should not rest on the dubious assumption that discretion will always be exercised as the Constitution demands. In addition, 28 U. S. C. §1441(b) provides that where diversity is the claimed basis of federal jurisdiction, a civil action

> ". . . shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought."

In other words, if any of the defendants in a multi-party action is a New York resident, the non-resident co-defendants would be barred from the benefit of §1404(a). (The majority opinion conveniently notes other "exceptions" in footnote 4.) Nor should the constitutionality of this procedure turn on whether the matter in controversy exceeds $10,000.

For these reasons and for those set forth in the prior dissenting opinion I reassert my disagreement with the majority decision.

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6 See n. 1, *supra*.

Relevant Portions of the Policy

The "duty to defend" and the "duty to indemnify" appear on page 1 of the policy and read as follows:

"SECTION 1—LIABILITY PROTECTION

"PART 1.

Automobile Liability Insurance

"Coverage A—Bodily Injury

"Coverage B—Property Damage

"Allstate will pay for an insured all damages which the insured shall be legally obligated to pay because of:

A. bodily injury sustained by any person, and

B. injury to or destruction of property, arising out of the ownership, maintenance or use, including loading and unloading, of the owned automobile or a non-owned automobile.

"Allstate will defend any lawsuit, even if groundless, false or fraudulent, against any insured for such damages which are payable under the terms of this policy, but may make such settlement of any claim or suit as it deems expedient.

"Allstate will pay premiums on bonds to release attachments and will also pay the cost of bail bonds required of an insured because of accident or traffic law violation, not to exceed $200 per bail bond, but without any obligation to apply for or furnish such bonds." (19a-1)

The "Assistance and Cooperation" condition incorporated in the policy provides as follows:

"8. Assistance and Cooperation

"Under Sections I, II and IV, the insured shall cooperate with Allstate, disclosing all pertinent facts

known or available to him, and upon Allstate's request shall attend hearings and trials, and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits." (19a-4)

The "No Action" condition provides as follows:

"4. Action Against Allstate

"No action shall lie against Allstate until after full compliance with all the terms of this policy nor, as respects insurance afforded under Section I, until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and Allstate.

"Any person or organization or the legal representative thereof having secured such judgment or written agreement, shall be entitled to recover under this policy to the extent of the insurance afforded, but this policy shall not give any right to join Allstate in any action to determine the insured's liability, nor shall Allstate be impleaded by the insured or his legal representative. Bankruptcy or insolvency of the insured or his estate shall not relieve Allstate of any obligations." (19a-3)

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IN THE

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October Term, [redacted] 1969

No. [redacted] 177

OLIVER ROSENBERG; STEPHEN H. TYNG, SR. and STEPHEN H. TYNG, JR.,

Petitioners,

v.

MARIE MINICHIELLO, as Executrix of the Estate of THOMAS MINICHIELLO, and MARIE MINICHIELLO; and ELWIN W. STEVENS, on behalf of his son, DENNIS J. STEVENS, an infant over fourteen years of age; and ELWIN W. STEVENS, individually,

Respondents.

BRIEF OF RESPONDENT ELWIN W. STEVENS (ON BEHALF OF HIS SON, DENNIS J. STEVENS, AND INDIVIDUALLY) IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

October Term, 1968

No. 1461

OLIVER ROSENBERG; STEPHEN H. TYNG, SR. and STEPHEN H. TYNG, JR.,

Petitioners,

v.

MARIE MINICHIELLO, as Executrix of the Estate of THOMAS MINICHIELLO, and MARIE MINICHIELLO; and ELWIN W. STEVENS, on behalf of his son, DENNIS J. STEVENS, an infant over fourteen years of age; and ELWIN W. STEVENS, individually,

Respondents.

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ARGUMENT

I

The constitutionality of New York's *Seider* Doctrine was upheld by this Court in *Hanover Insurance Co. v. Victor*, 393 U. S. 7.

The *Hanover* case was an appeal to this Court from a judgment of the New York Court of Appeals upholding the

constitutionality of New York's *Seider v. Roth* doctrine (decided by the Court of Appeals *sub nom Victor v. Lyon Associates, Inc.*, 21 N. Y. 2d 695; see also, *Seider v. Roth*, 17 N. Y. 2d 111). The New York Court of Appeals had decided the *Hanover* case simultaneously with *Simpson v. Loehmann* (21 N. Y. 2d 305, rearg. den., 21 N. Y. 2d 990) in a memorandum decision adopting, by reference, that Court's opinion in *Simpson*.

An examination of the papers and briefs submitted to this Court in the *Hanover* case shows that the appellant there made the identical arguments attacking the constitutionality of the *Seider* doctrine as the petitioners have advanced in the case at bar.

On October 14, 1968 this Court dismissed the *Hanover* appeal "for want of a substantial federal question." (*Hanover Insurance Co. v. Victor*, 393 U. S. 7).

It has long been recognized that this Court's dismissal of an appeal "for want of a substantial question" constitutes a decision on the merits that the State Court's disposition of the federal question was correct and that further argument of the matter would serve no useful purpose. (*Fidelity & Deposit Co. of Maryland v. United States*, 187 U. S. 315; *Baskin v. Industrial Accident Commission*, 338 U. S. 854; *North Coast Transportation Co. v. United States*, 323 U. S. 668; see also, the statement of Mr. Justice Brennan in his concurring opinion in *Ohio ex rel. Eaton v. Price*, 360 U. S. 246, at p. 247, that "votes to affirm summarily, and to dismiss for want of a substantial federal question, it hardly needs comment, are votes on the merits of a case * * *.")

It is also noteworthy that following this Court's dismissal of the *Hanover* appeal, Hanover petitioned this Court for a rehearing in which it argued that a full review should be

granted on the ground that "the constitutional questions arising from the attachment in New York of liability insurers' duties in order to obtain jurisdiction over non-residents are novel and are the subject of many suits pending in New York and Federal courts, both trial and appellate." As an example, Hanover specifically referred to the instant *Minichiello* case which was then awaiting decision by the U. S. Court of Appeals for the Second Circuit. Rehearing was denied by this Court on November 25, 1968 (393 U. S. 971).

II

The *Seider* Doctrine is constitutional under either the debt attachment concept or the direct action concept.

In *Simpson v. Loehmann, supra* (and its companion case of *Victor v. Lyon Associates, Inc., supra*) the New York Court of Appeals sustained the constitutionality of the *Seider* doctrine on the ground that the insurance policy obligation was a debt to the defendant which was subject to attachment in New York, and that under the long-established principle of *Harris v. Balk,* 198 U. S. 215, there was no denial of due process to the defendant (see the majority opinion of Chief Judge Fuld, 21 N. Y. 2d 305, at p. 307). In doing so the New York Court approved of the jurisdictional procedure followed in *Seider,* in which a New York action had been brought against the insured with *quasi in rem* jurisdiction based upon the attachment of the insurance policy in New York and personal service on the insured outside the state. Judge Keating, however, in a separate opinion, concurred in the Court's decision that the *Seider* procedure was constitutional but based his conclusion on his view that even a direct action by the plaintiff

against the defendant's insurance company would have been constitutional (21 N. Y. 2d 305, at p. 312).

In the *Stevens* case at bar the U. S. District Court (Ryan, Ch. J.) sustained the constitutionality of the *Seider* procedure upon the debt attachment theory and quoted with approval from Chief Judge Fuld's opinion in *Simpson* (App. i). On appeal to the U. S. Court of Appeals the majority of the three judge panel which first heard this case affirmed, but placed their primary emphasis upon Judge Keating's approach that the effect of the *Seider* procedure was comparable to a direct action statute and held that since, in their opinion, a direct action statute would be constitutional, the *Seider* doctrine was also constitutional (App. 1a).

On the rehearing *in banc*, in which the Court of Appeals adhered to its original affirmance, the majority gave additional consideration to the attachment concept and held that *Seider* was also constitutional under that approach, citing *Harris v. Balk*, 198 U. S. 215 (App. 41a).

We contend that the constitutionality of the *Seider* doctrine can be sustained under either theory. The two opinions of Circuit Judge Friendly in the instant cases, the opinion of District Judge Ryan below in the *Stevens* case, the opinion of Chief Judge Desmond of the New York Court of Appeals in the *Seider* case, the opinions of Chief Judge Fuld and Judge Keating of the New York Court of Appeals in the *Simpson* case, that Court's *per curiam* opinion denying reargument in such case, and the brief submitted to this Court in the *Hanover* case by the Appellee there, in support of his motion to dismiss that appeal, all discuss these points cogently. Rather than burden this Court with a repetition of those arguments here, we respectfully refer

the Court to such opinions and brief and shall limit our present discussion to some additional observations.

In his dissenting opinions in the cases at bar Circuit Judge Anderson apparently felt that there was something inherently unfair about a *Seider* attachment of an insurance debt, as distinguished from attachment of other types of obligations. As can be seen from his hypothetical example in his original dissenting opinion, he was troubled by the prospect that under the *Seider* doctrine a resident of Alaska, as the accident state, who never resided elsewhere and who had never entered the State of New York or had any business there, could be subjected to the jurisdiction of New York and have to defend himself there. We submit, however, that the same situation could arise under other existing debt attachment laws which have long been held constitutional.

Suppose, for example, that same Alaskan had a bank account or investment account with the Alaska office of a bank, investment banker or stock brokerage firm which also maintained an office and engaged in business in New York. Obviously, the amount credited to the Alaskan's account would represent a debt owing to him by the bank or brokerage firm and would be subject to attachment in New York by the New York resident as the basis for *quasi in rem* jurisdiction to the extent of the debt. Here, too, the Alaskan who had never resided elsewhere, had never entered the State of New York or had any business there would be subjected to the jurisdiction of New York (to the extent of the attached debt) and have to defend himself there simply because his Alaskan debtor, over whom he had no control, happened to engage in business in New York.

If the reasoning of Judge Anderson's dissent is adopted by this Court it will mean that a debt could no longer comprise the *res* of an attachment outside the defendant's own state unless the defendant has additional contacts of his own with the other state, notwithstanding the fact that the debtor and the obligation sought to be attached are concededly amenable to the other state's legal process and jurisdiction. We submit that such a result would be in direct conflict with this Court's decisions in *Harris v. Balk, supra* and *Pennington v. Fourth National Bank,* 243 U. S. 269, holding that a debt may be attached, and *quasi in rem* jurisdiction founded thereon, in any state where the debtor is amenable to personal service of process. We further submit that the *Seider* doctrine stands on exactly the same legal footing.

Petitioners' position is that a person who ventures outside the borders of his home state does so at his own risk. They argue that if he is injured in another state, even if entirely the fault of another driver, his suit must be brought in the defendant's home state, regardless of all other considerations. We submit that such approach is narrow and provincial and ignores our present day mobile society and the realities of automobile negligence litigation. In rejecting the same argument in the *Seider* and *Simpson* cases the New York Court of Appeals recognized that the law must be construed in a contemporary and pragmatic fashion to achieve justice and protect the rights of all of the parties. The New York Court achieved that objective in *Seider* by preserving traditional concepts of jurisdiction, but updating them to meet current considerations. The awareness of the courts of the need to adapt legal concepts to meet contemporary problems and of the dangers of rigid

adherence to doctrinaire principles is the lifeblood of the law's growth.

The *Seider* doctrine achieves justice by balancing the rights and obligations of both parties, rather than weighting the scale in favor of the defendant, which would be the result in the cases at bar without *Seider*. The petitioners contend that *Seider* is unfair to a defendant because it permits him to be sued in another state to the extent of his insurance coverage. But such a defendant does not stand alone or helpless in that other state for his insurance company is there ready and able to provide him with all the services and indemnity called for by his policy, to the same extent as though the action had been brought in his home state. His company, through its local office in the venue state, will retain and pay for expert local counsel, cause a thorough investigation to be made wherever necessary using the facilities of its nationwide network of offices, and, in a proper case, attempt to negotiate a settlement with the plaintiff and his attorney. If the case proceeds to trial the company will make the necessary arrangements for the appearances of witnesses and the conduct of the trial. These are services which the company agreed to furnish to the defendant under the terms of the policy requiring it to defend in any place where jurisdiction is obtained against its insured. The company is not doing so gratuitously. This is its business and the defendant, by his insurance premiums, has paid the company to do so. In other words, so far as the conduct of the litigation is concerned, neither party has any practical advantage over the other.

On the other hand, without *Seider*, a plaintiff injured in another state is placed at a serious disadvantage in pursuing his rights. Regardless of how flagrant the culpability

of the local defendant may be (*e. g.*, a drunk driver running down a non-resident pedestrian on the sidewalk) the plaintiff would be compelled to litigate in the defendant's home state. Unlike the defendant, he does not automatically have someone to turn to away from his home state, with full facilities to handle the matter and the related expenses from beginning to end. He must seek out a stranger as his attorney to handle the matter with a distant office of the defendant's insurance company even though that same company has another office in the plaintiff's home state, or even his home city, to which the matter could just as easily have been referred.

It needs no elaboration to point out that in the real world of negligence litigation the insurance companies are not unmindful of the practical problems confronting a plaintiff in litigating a matter in a foreign jurisdiction and of the advantage this gives the company in effecting settlement terms much more favorable to it than would otherwise be the case if the plaintiff were evenly matched with the defendant's insurance company in a jurisdiction where both the plaintiff resided and the insurance company conducted its business.

It is important to bear in mind that even under the *Seider* doctrine the courts always have the right to transfer venue from the plaintiff's jurisdiction to that of the defendant on the ground of *forum non conveniens* where the circumstances of the case warrant it. A procedural pattern for *Seider* type cases has already been taking form. In a typical case the plaintiff brings his action in the state court based on his attachment of the insurance policy. The non-resident defendant, through a New York branch of his insurance company, removes the case to federal district court on diversity grounds and then moves for a change of

venue to the federal district court of the defendant's state. If, as Judge Anderson suggested in his dissent below, there might be persuasive venue considerations in a given case, such as availability of witnesses or police and medical records, affording the jury an opportunity to view the accident scene, the ease of ascertaining the governing law, etc., the district court need only grant the motion for a change of venue. But the fact that in some cases a change of venue to the defendant's jurisdiction might serve the ends of justice is not justification for adopting a blanket rule that the place where the accident occurred will always be the most appropriate place of venue. We need look no further than the *Stevens* case at bar for a case directly in point.

The plaintiffs in the *Stevens* case are residents of New York, residing near Troy. The defendants, Tyng, are residents of Massachusetts, residing on Cape Cod, and the accident occurred on Cape Cod. After removing the plaintiffs' New York action to the U. S. District Court for the Northern District of New York the defendants (through their New York attorneys employed by their insurance company pursuant to the policy obligation) moved for a transfer of venue to the U. S. District Court for Massachusetts, for the convenience of the parties and witnesses pursuant to 28 U. S. C. § 1404(a). The defendants' motion was denied by Chief Judge Sylvester J. Ryan of the Southern District of New York (to whom the case had been referred) on the ground that "the principal factual issue for trial is the extent of plaintiff Dennis J. Stevens' injuries. The important witnesses on this would be the doctors who operated upon and treated Stevens, and indeed, Stevens himself; they all reside in New York. * * * Defendants have

entirely failed to establish that a transfer should be ordered" (see App. v).

We respectfully submit that the *Seider* doctrine rests on a sound constitutional basis whether considered in the traditional concept of the attachment of a debt or by analogy to a direct action statute, and that such doctrine does no more than recognize the realities of our contemporary mobile society and the practical impact of universal automobile liability insurance coverage on the enforcement of negligence claims.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

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Respondents.

MEMORANDUM OF RESPONDENT, MARIE MINICHIELLO, INDIVIDUALLY AND AS EXECUTRIX, IN LIEU OF BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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October Term, 1968

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Petitioners,

v.

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Respondents.

Memorandum in Lieu of Brief

We do not wish to burden this Court with repetitious argument. We concur in the brief of respondent, Elwin W. Stevens (on behalf of his son, Dennis J. Stevens, and individually), in opposition to the petition for a writ of certiorari filed by Attorney Irving I. Waxman. We merely add that the petition for a writ of certiorari should be denied for want of a substantial federal question. See *Hanover Insurance Co. v. Victor,* 393 U. S. 7.

Wright on Federal Courts, 4108, at page 431, says:

> "Denial of certiorari, as has frequently been explained, imports nothing as to the merits of the case. All it means is that, for whatever reason, there were not four members of the Court who wished to hear the case. *Summary disposition of an appeal, however, either by affirmance or by dismissal for want of a substantial federal question, is a disposition on the merits.*"

Under the *Seider* doctrine a plaintiff may obtain *quasi-in-rem* jurisdiction over a non-resident defendant by attaching the obligation of the defendant's insurer to defend and indemnify the defendant under a liability insurance policy if the insurer is subject to jurisdiction in New York. This created quite a stir which awakened legal theorists and writers as to probable consequences under various circumstances, and has shaken our jurisprudence in the area of *in rem* jurisdiction.

In *Simpson v. Loehmann,* 21 N. Y. 2d 305, (1967), at pages 311 and 312, the New York Court of Appeals stated:

> "The historical limitations on both *in personam* and *in rem* jurisdiction, with their rigid tests, are giving way to a more realistic and reasonable evaluation of the respective rights of plaintiffs, defendants and the State in terms of fairness. (See, *e.g.,* International Shoe Co. v. Washington, 66 S. Ct. 154, 326 U. S. 310, 90 L. Ed. 95, 161 A. L. R. 1057; McGee v. International Life Ins. Co., 78 S. Ct. 199, 355 U. S. 220, 2 L. Ed. 2d 223; Longines-Wittnauer Watch Co. v. Barnes & Reinecke, 21 A. D. 2d 474, 15 N. Y. 2d 443, 251 N. Y. S. 3d 740.) Such an evaluation requires a practical appraisal of the situation of the various parties rather than an emphasis upon somewhat magical and medieval concepts of presence and power." . . .
>
> "Almost half a century ago, Chief Judge Cardozo began his famous article, '*A Ministry of Justice*' (35

> Harv. L. Rev. 113), with the statement that 'The courts are not helped as they could and ought to be in the adaptation of law to justice'. Some time thereafter, the New York Legislature created a Law Revision Commission and, more recently, the State's Judicial Conference appointed an Advisory Committee on Practice and Procedure to make studies and recommend changes in the rules and statutes governing our law. Revision of the bases for *in personam* jurisdiction has been the subject of recent major legislative changes. The bases for the exercise of *in rem* jurisdiction, however, have been carried over into the CPLR from the Civil Practice Act with little change. Under the circumstances, it would be both useful and desirable for the Law Revision Commission and the Advisory Committee of the Judicial Conference, jointly or separately, to conduct studies in depth and make recommendations with respect to the impact of *in rem* jurisdiction on not only litigants in personal injury cases and the insurance industry but also our citizenry generally. In the course of such studies, consideration will undoubtedly be given to the relationship *inter se*, of *in rem* jurisdiction, *in personam* jurisdiction and *forum non conveniens*. Absent new data suggesting the desirability of a departure from the general principles underlying *in rem* jurisdiction, as reflected in *Seider*, we find neither basis nor justification for departing from our holding in that case."

In February, 1968, the federal court, Southern District of New York, in *Podolsky v. Devinney*, 281 F. Supp. 1968, held the *Seider* doctrine unconstitutional, that the compulsion of submitting to personal jurisdiction or risking a default amounted to deprivation of property without due process of law.

In April, 1968, in a memorandum decision denying a motion for reargument in the case of *Simpson v. Loehmann*, 21 N. Y. 2d 990, the New York Court of Appeals responded to the constitutional challenge of the no-limited-appearance-rule, as applied to a *Seider*-situation, and held that

the recovery in this sort of case would be limited to the face value of the attached insurance policy.

We wish to point out that the New York Legislature in its 1969 Session approved the proposal of the Judicial Conference and amended the Civil Practice Law and Rules by incorporating in Subdivision (c) of Rule 320 of the CPLR a provision for a limited appearance in attachment-based cases. Now, by this amendment, in cases where jurisdiction is based solely on a levy on defendant's property within the state pursuant to an order of attachment, defendant's appearance is not equivalent to *in personam* jurisdiction.

Respectfully submitted,

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and as executrix.

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IN THE

Supreme Court of the United States

October Term, 1969

No. 177

OLIVER ROSENBERG; STEPHEN H. TYNG, SR. and STEPHEN H. TYNG, JR.,

Petitioners

v.

MARIE MINICHIELLO, as Executrix of the Estate of THOMAS MINICHIELLO, and MARIE MINICHIELLO; and ELWIN W. STEVENS, on behalf of his son, DENNIS J. STEVENS, an infant over fourteen years of age; and ELWIN W. STEVENS, individually,

Respondents

PETITION FOR REHEARING

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PETITION FOR REHEARING

Petitioners Oliver Rosenberg, Stephen H. Tyng, Sr., and Stephen H. Tyng, Jr., respectfully pray the Court to (1) grant rehearing of its order of October 13, 1969, denying the petition for writ of certiorari, and (2) issue a writ of certiorari to review the judgment of the Court of Appeals for the Second Circuit prayed for in the petition filed June 5, 1969, herein. As grounds for this petition, petitioners cite the following:

1. The subsequent inconsistent decision of the Court of Appeals and its effect on the law.

The petition for certiorari in the instant case was filed on June 5, 1969, at No. 1461, October Term, 1968 (renumbered No. 177 of the current term).

After the Court of Appeals decided the instant case on rehearing, 410 F. (2d) 177, (three judges dissenting), it decided the case of *Farrell v. Piedmont Aviation, Inc.*, 411 F. (2d) 812.

A petition for certiorari in the *Farrell* case was filed at No. 370 of this term.

Petitioners believed it inappropriate to call this Court's attention to the inconsistencies of the two decisions, and the resulting confusion in the law, while both cases were pending in this Court.

However, both petitions were denied on October 13, 1969 and petitioners now seek relief from this Court.

As reference to the petition and appendix filed with this Court in the instant case will disclose, the judgment challenged in this case is one in which the Court of Appeals has held that New York State courts may exercise jurisdiction over residents of Pennsylvania and Massachusetts, respectively, in negligence actions based on accidents which happened in Pennsylvania and Massachusetts, respectively.

In its initial opinion, 410 F. (2d) 106, the Court of Appeals sustained the action by upholding, over federal constitutional objections, the validity of a New York attachment statute interpreted in such a way as to treat a casualty insurer's obligation to defend and to indemnify the non-resident defendant as an attachable "debt" in cases where the insurer had an office in New York, even though the policies were sold and delivered outside New York and the accidents happened outside New York.

The Court of Appeals conjectured, in that original opinion, that this Court would approve a "judicially-created" New York direct-action "statute" under which the insurer would be held to be the real party in interest and a conduit whereby the New York plaintiff could reach an otherwise unreachable non-resident defendant.

When petitioners' petitions for rehearing pointed out to the Court of Appeals *en banc* that this holding was contrary to the reasoning underlying *Watson v. Employers Liability Assurance Corp.*, 348 U.S. 66, and violated the individual non-resident insureds'[1] right to due process of law (the insureds being the only named defendants), the Court of Appeals held, 411 F. (2d) 117, (three judges dissenting), that the attachment, and the resultant suit, were nevertheless valid under the case of *Harris v. Balk*, 198 U.S. 215. That case involved attachment in Maryland (by a third party who found Harris in Maryland) of a fixed $180 debt due from Harris to Balk.

In both its original opinion, 410 F. (2d) 106, and its opinion *en banc* on rehearing, 410 F. (2d) 117, the Court of Appeals, over petitioners' objections, held that the insurer's "duty to defend" was property attachable in New

[1] As characterized by the majority of the Court of Appeals *en banc* at 410 F. (2d) 117-188, petitioners complained that "we did not adequately focus on the burden to a non-resident of having to defend a personal-injury action in another state, considerably far from his domicile and the place of the accident, *simply because his liability insurer has chosen to do business there*." (Emphasis added).

York and provided a basis for jurisdiction over the non-resident petitioners as defendants in suits based on out-of-state accidents. The Court of Appeals recognized that, without some property in New York to serve as a basis for an attachment, the New York courts could not obtain even *in rem* jurisdiction over the non-resident defendants who had no contact whatsoever with New York. Indeed, this was the very reason impelling New York plaintiffs to resort to the "attachment" process.

However, in *Farrell v. Piedmont Aviation, Inc.*, 411 F. (2d) 812, certiorari denied October 13, 1969, the Court of Appeals, after characterizing the action as one "by non-residents against other non-residents who have no contacts with New York, and arises out of an occurrence in another state," then said (411 F. (2d) 816):

> "In truth the defendants own nothing in New York or at least nothing that they do not 'own' to some extent in every state; their insurers are bound to defend and indemnify them wherever they are sued, even in a state where the insurers are not doing business. Under such circumstances, where there are absolutely no New York contacts except for the doing of business by the insurers, we have the gravest difficulty in understanding how New York could constitutionally call upon the insureds to respond or could impair by attachment rights the insurers would otherwise have to settle with other claimants."[2]

This was the precise point which petitioners urged on the Court of Appeals in the instant case but it was rejected by a majority of that court over a strong dissent.

The net result, now that this Court has denied

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[2] Here the Court of Appeals apparently recognized a fact that it rather blithely ignored in the instant case—that taking a defendant's property "only" to the extent of his insurance coverage is a serious deprivation of property, as indeed it is. It is merely all the protection the insured has against the potential disaster of a substantial jury verdict.

certiorari in both the instant case and the *Farrell* case, is to let stand decisions by the Court of Appeals establishing the following inconsistent rules of constitutional law:

> (1) Absent some attachable property in New York, that state cannot constitutionally exercise even *in rem* jurisdiction over a non-resident with no New York contacts, even when the plaintiff is a New York resident; and
>
> (2) The presence of the non-resident's insurer in New York does *not*, of itself, give New York constitutional power to summon the non-resident and jeopardize his insurance coverage (*Farrell* case); but
>
> (3) New York does have power to summon a non-resident insured to that state and to jeopardize his insurance coverage in a suit there—*if* the plaintiff is a resident of New York (instant case).

In other words, a non-resident's constitutional right to be free of the jurisdiction of a state with which he has no contacts, and in which he has no attachable property, depends upon the residence of the plaintiff who sues him. It *is* a denial of due process to make him answer a non-resident who sues him in a state where his insurer does business, but *not* a denial of due process if the plaintiff is also a resident there. The duty to defend *is* attachable property if the plaintiff is a resident of New York, but it is *not* attachable property if the plaintiff is *not* a resident of New York.

Petitioners submit that this new holding, making the same "duty to defend" property at one time and not property at another, with serious resultant constitutional effects, now requires review by this Court. A defendant's right to due process cannot properly be made subject to such confused and confusing rulings on federal constitutional issues.

2. The unconstitutional effect of the inconsistent rulings by the Court of Appeals.

In the instant case, the Court of Appeals held that the presence of the insurer validated the attachment and created jurisdiction over the defendant. In *Farrell*, the same court said exactly the contrary, adopting petitioners' view that:

> "defendants own nothing in New York" and added (at 411 F. (2d) 816), "where there are absolutely no New York contacts except for the doing of business by the insurer, we have the gravest difficulty in understanding how New York could constitutionally call upon the insureds to respond or could impair by attachment rights the insurer would otherwise have to settle with other claimants."[3]

Thus:

(1) Presence of a New York plaintiff does *not*, of itself, give New York jurisdiction over the non-resident defendant.[4] (Instant case, 410 F. (2d) 106 and 117); and

(2) the presence in New York of the defendant's insurer does *not*, of itself, give New York jurisdiction

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[3] In *Hanson v. Denckla*, 357 U.S. 235, 253, this Court said:

> "The unilateral activity of those who claim some relationship with a non-resident defendant cannot satisfy the requirement of contact with the forum state. The application of that rule will vary with the quality and nature of the defendant's activity, but *it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State*, thus invoking the benefits and protections of its laws." (Emphasis added).

[4] If it did, New York plaintiffs would not have to rely on the attachment of the "duty to defend" authorized by the *Seider* case and approved in the instant case by the Court of Appeals.

over the non-resident defendant (*Farrell* case, 411 F. (2d) 812, 816); but

(3) the New York plaintiff (which is not in itself enough) plus the New York insurer (which is not in itself enough) *do* add up to enough to force the non-resident to New York and to jeopardize his insurance coverage (instant case).

It is indeed a strange equation: 0 + 0 = 2. Even 0 + 0 = 1 would be a result strange enough to justify exercise of this Court's jurisdiction for the guidance of the federal District Courts in New York which are holding many cases pending this Court's final action in this case.

CONCLUSION

Petitioners submit that this Court, in its exercise of supervision over the lower federal courts, and as the ultimate guardian of the federal constitutional rights of the citizens of the states, should grant rehearing and either reverse the judgment below or remand the case to the Court of Appeals for the Second Circuit for reconsideration of this divided (6-3) decision which is utterly inconsistent not only with decisions of this Court beginning at least with *Home Ins. Co. v. Dick*, 281 U.S. 397, but also inconsistent with *Farrell v. Piedmont Aviation, Inc.*, 411 F. (2d) 812, certiorari denied October 13, 1969.

For the reasons set forth above and in the petition for certiorari, it is respectfully urged that rehearing be

granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Second Circuit.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

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